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NO.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

LOUISIANA POWER & LIGHT COMPANY

VERSUS

L.K. COMSTOCK & COMPANY, INC., ET AL.
Petitioners

PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

I. WHETHER the Court of Appeals for the Fifth Circuit erred in affirming the district court's denial of Petitioners' Motion to Amend Judgment to enforce a Federal Rules of Civil Procedure, Rule 68 Offer of Judgment in a multi-party antitrust litigation where the Plaintiff was successful, recovering treble damages, attorneys' fees and costs, but did not prevail against the offering defendants.

II. WHETHER attorneys' fees are recoverable as an element of costs under a Rule 68 Offer of Judgment in an antitrust action.

III. WHETHER Petitioner's Rule 68 Offer of Judgment, served fourteen (14) calendar days prior to the commencement of trial, was timely.

LIST OF PARTIES

In accordance with Supreme Court Rule 29.1, Petitioners submit the following list of all parties to the proceeding in the United States Court of Appeals for the Fifth Circuit, whose judgment is sought to be reviewed. The parties are:

List of Petitioners

1. L.K. Comstock & Company, Inc.
2. LKC, Inc.

List of All Other Parties

3. Louisiana Power & Light Company
4. Fischbach and Moore, Inc.
5. Fischbach Corporation
6. Francis S. Kellstrom
7. The Howard P. Foley Company
8. Commonwealth Electric Company

TABLE OF CONTENTS

TABLE OF AUTHORITIES v

QUESTIONS PRESENTED i

LIST OF PARTIES ii

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE PETITION 6

I. RULE 68 COSTS RECOVERABLE BY PREVAILING DEFENDANTS FROM THE PLAINTIFF WHO OBTAINS A JUDGMENT AGAINST CO-DEFENDANTS 10

II. RULE 68 REQUIRES THE PLAINTIFF TO PAY THE COSTS OF LITIGATION, INCLUDING ATTORNEYS' FEES, OF PREVAILING DEFENDANTS 15

III. COMSTOCK'S OFFER OF JUDGMENT, DATED JULY 22, 1992, WAS TIMELY 18

CONCLUSION 22

APPENDIX A
Judgment of the Fifth Circuit Court of Appeals dated April 10, 1995 ..... A - 1

APPENDIX B
Offer of Judgment dated July 22, 1992 ..... B - 1

APPENDIX C
Jury Verdict,
dated September 24, 1992 ..... C - 1

APPENDIX D
Judgment of the Eastern District of Louisiana,
Judge Marcel Livaudais, Jr.
dated September 25, 1992 ..... D - 1

APPENDIX E
Rulings on Motions of the
Eastern District of Louisiana
Judge Marcel Livaudais, Jr.
dated November 5, 1992 ..... E - 1

TABLE OF AUTHORITIES

CASES

Cf. Cover v. Chicago Eye Shield Co.,
136 F.2d 374 (7th Cir.), *cert. denied*,
320 U.S.749, 64 S.Ct. 53, 88 L.Ed. 445 (1943) 21

Crossman v. Marcoccio,
806 F.2d 329, 332 (1st Cir. 1986),
cert denied, 481 U.S. 1029(1987) 10

Delta Airlines v. August,
450 U.S. 346, 352, 101 S.Ct. 1146,
1150, 67 L.Ed.2d 287 (1981) 6-9, 11, 12-15

Dual v. Cleland,
79 F.R.D. 696, 697 (D.D.C. 1978) 10

Gay v. Waiters' and Dairy Lunchmen's Union, Local 30,
86 F.R.D. 500, 502 (N.D.Cal. 1980) 10

Greenwood v. Stevenson,
88 F.R.D. 225, 228 (D.R.I. 1980) 9, 20, 21

Johnston v. Penrod Drilling Co.,
803 F.2d 867, 869 (5th Cir. 1986) 9

Marek v. Chesney,
473 U.S. 1, 105 S.Ct. 3012, 87 L.Ed.2d 1(1985) 16-18

Nabors v. Texas Co.,
32 F.Supp. 91 (W.D.La. 1940) 9

Polk v. Montgomery County, Maryland,
130 F.R.D. 40, 42 (D.Md.1990) 19

Rickards v. Canine Eye Registration Foundation, Inc.,
783 F.2d 1329, 1334-35 (9th Cir. 1986), ***cert. denied***,
479 U.S. 851 (1986) 18

Staffend D. v. Lake Central Airlines, Inc.,
47 F.R.D. 218, 219-20 (N.D.Ohio 1969) 11

STATUTES AND RULES

Attorney's Fees Awards Act of 1976,
42 U.S.C. §1988 16

Clayton Antitrust Act,
15 U.S.C. §1 *et seq.* 3, 17, 18

Federal Rules of Civil Procedure,
Rule 6(a) 2, 7, 18-20, 23

Federal Rules of Civil Procedure,
Rule 54(a) 3, 7, 12

Federal Rules of Civil Procedure,
Rule 68 ..... 2, 4-23

OTHER AUTHORITIES

Webster's New International Dictionary, 2nd Ed., unabridged, 1947 ..22

NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

PETITION FOR WRIT OF CERTIORARI FROM UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioners, L.K. Comstock & Company, Inc. and LKC, Inc., respectfully pray that a writ for certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered April 10, 1995.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 50 F.3d 319. (Appendix A). The opinion of the Eastern District of Louisiana is not reported. (Appendix B).

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on April 10, 1995. No Petition for Rehearing was filed. The jurisdiction of the Honorable Court is invoked under 28 U.S.C. §1254 (1).

STATUTORY PROVISIONS INVOLVED

1. Rule 68 of the Federal Rules of Civil Procedure provides:

> At any time more than ten days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer of judgment the adverse party serves written notice that the offer is accepted, either party may then file the offer and the notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. . . .

2. Rule 6(a) of the Federal Rules of Civil Procedure provides in part:

> **Computation.** In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of the court, or by any applicable statute, the day of the act, event or default from which the designated period of time begins to run shall not be included. The last day of the period shall be included, unless it is a Saturday, a Sunday, or a legal holiday, or, when the act to be done is the filing of a paper in court, a day upon which the weather conditions has made the office of the clerk of court inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days. When the period of time prescribed or allowed is less than eleven (11) days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.

3. Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988(b) provides:

In any action or proceeding to enforce any provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of the Public Law 92-318 [20 U.S.C.A. § 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. § 2000bb et seq.], Title VI of the Civil Rights Act of 1964 {42 U.S.C.A. § 2000d et seq.], or section 13981 of this title,, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

4. Clayton Antitrust Act, 15 U.S.C.A. § 15 provides:

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in the district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee.

5. Federal Rules of Civil Procedure, Rule 54(a) provides:

(a) **Definition; Form.** "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

STATEMENT OF THE CASE

On February 7, 1986, the plaintiff, Louisiana Power & Light Company ("LP&L"), filed this antitrust and RICO action against multiple defendants, including the Petitioners, L.K. Comstock & Company, Inc. and LKC, Inc. ("Comstock" or "Petitioners"), alleging that the electrical contractors who bid on the Waterford 3 Nuclear Power Plant electrical contract colluded and rigged the bids submitted in 1976 and 1977. Jurisdidiction in the United States District Court for the Eastern District

of Louisiana was pursuant to 28 U.S.C. § 1331, Federal Question.

On July 22, 1992, Comstock served a timely Offer of Judgment on LP&L pursuant to Rule 68 of the Federal Rules of Civil Procedure. (See Offer of Judgment, entry of 7/22/92, Appendix "B"). LP&L failed to respond to the Offer of Judgment.

Jury selection of this complex anti-trust litigation commenced on Monday, August 3, 1992. The actual trial of this matter began with Opening Statements on Wednesday, August 5, 1992. After seven weeks of trial, the jury returned its verdict and found the co-defendants, Fischbach & Moore, Inc., Fischbach Corporation, Commonwealth Electric Co., The Howard P. Foley Co., and Francis S. Kellstrom liable in the amount of $500,000.00, which was trebled by the district court pursuant to the Clayton Antitrust Act, 15 U.S.C. §1 *et seq.* **However, Comstock was found by the jury not to have committed any anti-trust or RICO violations.** (See Jury Verdict, dated September 24, 1992, Appendix "C"). Accordingly, on September 25, 1992, the district court entered Judgment in favor of LP&L and against co-defendants, Fischbach & Moore, Inc., Fischbach Corporation, Commonwealth Electric Co., The Howard P. Foley Co., and Francis S. Kellstrom, and in favor of Petitioners, dismissing LP&L's complaint against Comstock at LP&L's cost.[1] (See Judgment, dated

[1] The Judgment also dismissed Plaintiff's claims against co-defendants Commonwealth Companies, Inc., John D. Keys, Lewis Z. Eastham, J.R. Sturgill and Paul D. Murphy.

9/25/92, Appendix "D"). As that Judgment awarded $1.5 million in damages plus attorneys' fees and costs, it can hardly be described as a "take nothing" judgment.[2]

Petitioners moved to amend the district court's Judgment to enforce Petitioners' Offer of Judgment made and served on LP&L under Federal Rules of Civil Procedure, Rule 68.

On November 5, 1992, the district court entered its ruling on five post-trial motions filed by various parties, including Petitioners' Motion to Amend Judgment. (See Rulings on Motions, entered 11/5/92, Appendix "E"). The district court, in its order, denied Comstock's Motion to Amend Judgment on two grounds: (1) the Offer of Judgment was not timely, and (2) Rule 68 is not applicable to defendants who obtain judgment in their favor. (Id.).

On November 12, 1993, and again on December 14, 1993, Comstock filed a Notice of Appeal to the United States Court of Appeals for the Fifth Circuit ("Fifth Circuit") appealing the order of the district court denying Comstock's Motion to Amend the Judgment awarding costs, including reasonable attorneys' fees, pursuant to Rule 68.

The Fifth Circuit entered Judgment on April 10, 1995,

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[2] In addition to the $1.5 million awarded to LP&L, LP&L was awarded $4,182,893.72, with interest thereon from September 25, 1992, in costs and attorneys' fees from the defendants cast in judgment. This award was appealed by defendants, Fischbach & Moore, Inc., Fischbach Corporation, and Francis S. Kellstrom, who were cast in judgment. On April 10, 1995, the Fifth Circuit modified that award to the amount of $4,136,478.74.

determining that Petitioners' Rule 68 Offer of Judgment did not provide a basis for recovery because Plaintiff had not prevailed on its claims against Comstock, although it did prevail against the remaining defendants. (See Judgment, dated April 10, 1995, Appendix "A") The court also determined that its judgment rendered moot the issue of timeliness of the Offer of Judgment and did not address the issue of whether in an antitrust action, attorney's fees are recoverable under Rule 68, including the scope of costs recoverable under a Rule 68 offer of judgment.

The Petitioners seek a Writ of Certiorari of the April 10, 1995 Judgment of the Fifth Circuit affirming the district court's denial of Comstock's Motion to Amend Judgment to include Rule 68 attorneys' fees and costs. While Plaintiff did not prevail on its claims against Comstock, the Plaintiff was victorious against the Petitioners' co-defendants. As such, the Plaintiff did not "take nothing", and should be required to reimburse Petitioners out of the spoils of its victory for the fees and costs incurred following their Offer of Judgment.

REASONS FOR GRANTING THE PETITION

The primary issue presented is the proper interpretation of Rule 68 and the effect of the Court's holding in ***Delta Air Lines, Inc. v. August***, 450 U.S. 346, 67 L.Ed.2d 287, 191 S.Ct. 1146 (1981), on Rule 68's application to the facts of this case, where the Plaintiff was successfu' recovering treble damages, attorneys' fees and costs, but did not prevail

against the Petitioners, the offering defendants. Petitioners also seek a determination of the proper computation of the time for serving an offer of judgment under Rules 68 and 6(a), as well as the scope of costs recoverable under Rule 68 in an antitrust action.

There are three possible interpretations of Rule 68 and ***Delta*** and under each it is clear that the Offer of Judgment made by the Petitioners is enforceable. If, as Chief Justice Rehnquist stated in his dissent, the Court in ***Delta*** erred by reading into the statute "victory" as an additional prerequisite to enforceability, then, under the "plain reading" of Rule 68 all that is required for an enforceable offer of judgment is that a plaintiff obtain a judgment as defined under Rule 54 and that judgment be less favorable than the offer. Both prerequisites were met in this case when the Plaintiff obtained a judgment against the Petitioners' co-defendants "from which an appeal lies", and the Plaintiff, while awarded treble damages, attorneys' fees and costs against the other defendants, recovered nothing from the Petitioners. As the Plaintiff's recovery against the Petitioners was less favorable than Petitioners' Offer of Judgment, the denial of the Motion to Amend to award costs from the date of the offer was improper.

Even assuming that the Court was correct when it read into Rule 68 a requirement that the plaintiff be victorious, then the Fifth Circuit erred when, in light of LP&L's $1.5 million judgment against Petitioners'

co-defendants, it refused to treat LP&L as victorious for the Petitioners' Offer of Judgment.

Regardless of the validity of the ***Delta*** ruling or the correctness of the dissent, Petitioners submit that ***Delta*** is inapplicable because this case presents an issue of first impression which should be resolved by this Court. ***Delta***, and every reported case which has addressed Rule 68, has involved only ***one defendant*** or a joint offer by all co-defendants. This case involves ***one plaintiff*** and ***multiple defendants*** where the plaintiff obtained a favorable judgment against some co-defendants but not the offering defendants. Such a fact situation has not been, but should be addressed by this Court. Given the prevalence of complex litigations in today's society, guidance is needed as to the proper application of Rule 68 in a multi-party action.

Under Federal Rules of Civil Procedure, Rule 68, a defendant can, *more than ten days* before trial, offer a plaintiff to allow a judgment to be take against the defendant for a specified amount of money or property. However, if the plaintiff refuses the offer and later wins at trial but recovers an amount less than set forth in the offer of judgment, plaintiff must reimburse the defendant the costs incurred since the service of the offer of judgment.

Rule 68 provides in relevant part:

> At any time ***more than ten days*** before the trial begins, a party defending against a claim may

> serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. . . . If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree ***must pay the costs incurred*** after the making of the offer. . . .

Fed.R.Civ.P. 68 [emphasis added].

The purpose of Rule 68 is to encourage settlement of litigation, thereby avoiding the expense to the parties and the courts of protracted litigation, and to protect a party who offers judgment from liability for subsequently accrued costs. ***Greenwood v. Stevenson***, 88 F.R.D. 225, 228 (D.R.I. 1980). See also ***Nabors v. Texas Co.***, 32 F.Supp. 91 (W.D.La. 1940); ***Delta Air Lines, Inc. v. August***, 450 U.S. 346, 352, 101 S.Ct. 1146, 1150, 67 L.Ed.2d 287 (1981).

The language of Rule 68 is mandatory; where the Rule operates it leaves no room for district court discretion. See ***Delta***, 450 U.S. at 355-56, 101 S.Ct. at 1151-52; ***Johnston v. Penrod Drilling Co.***, 803 F.2d 867, 869 (5th Cir. 1986). The Rule provides a plaintiff with an additional incentive to settle a case by creating the possibility that the plaintiff will "lose some of the benefits of victory if its recovery is less than the offer." ***Delta***, 450 U.S. at 352, 101 S.Ct. at 1150. Further, the Rule stresses that the offeree ***must pay*** the costs incurred, thus suggesting an affirmative action. Reading Rule 68 to require the payment of defendants' post-offer costs enhances both defendants' incentive to extend Rule 68 offers of

judgment and plaintiffs' incentive to accept such offers. ***Crossman v. Marcoccio***, 806 F.2d 329, 332 (1st Cir. 1986), ***cert. denied***, 481 U.S. 1029, 95 L. Ed. 2d 527, 107 S. Ct. 1955 (1987).

The provision in the Rule which imposes costs upon a party who refuses an offer of judgment and who later recovers, "puts teeth in the Rule and makes it effective by encouraging acceptance." ***Staffend D. v. Lake Central Airlines, Inc.***, 47 F.R.D. 218, 219-20 (N.D.Ohio 1969). In other words, Rule 68 obligates plaintiffs to pay defendants' post-offer costs after rejecting an offer more favorable than the judgment eventually obtained. In ***Gay v. Waiters' and Dairy Lunchmen's Union***, 86 F.R.D. 500, 502 (N.D.Cal. 1980), the court held that a plaintiff who rejects an offer of judgment "assum[es] the risk that the outcome of the case will be less favorable than the offer, on pain of having to pay the cost subsequently incurred by the offerer." See also ***Dual v. Cleland***, 79 F.R.D. 696, 697 (D.D.C. 1978). Such was the risk assumed by LP&L when it rejected Petitioners' Offer of Judgment. Failure to enforce the Offer of Judgment in this case takes the teeth out of Rule 68 in a multi-party litigation where the Rule would provide an added mechanism for streamlining litigation and reducing expenses of the parties and the trial court.

I. RULE 68 COSTS RECOVERABLE BY PREVAILING DEFENDANTS FROM THE PLAINTIFF WHO OBTAINS JUDGMENT AGAINST CO-DEFENDANTS

Regardless of the interpretation of Rule 68 and the application

of the ruling in ***Delta***, the Offer of Judgment made by the Petitioners is enforceable, and the Appellate Court's refusal to overturn the district court's denial of the Petitioners' Motion to Amend Judgment to enforce their Offer of Judgment was an error.

In ***Delta***, this Court read into the plain language of Rule 68 a requirement that the plaintiff be victorious, opining that the nonsettling plaintiff should not run "the risk of suffering additional burdens that do not ordinarily attend a defeat." ***Delta***, 450 U.S. at 352. Such condition does not exist in Rule 68 as written and the Petitioners submit that Rule 68 applies equally in the situation where the plaintiff "takes nothing" and where the plaintiff is victorious but recovers less than set forth in the offer of judgment.

In reaching its determination that a Rule 68 offer only applies in a situation where a plaintiff obtains a judgment in its favor, the Supreme Court reasoned that where a successful plaintiff "rejects a Rule 68 settlement offer, he will lose some of the benefits of victory if his recovery is less than the offer." ***Delta***, 450 U.S. at 352. The ruling in ***Delta*** ignores the true meaning of the term "judgment" in the Federal Rules of Civil Procedure, and instead equates the word "judgment" in Rule 68 only with a victory. Rule 68 provides that, "[i]f the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer . . ." (emphasis added). Federal

Rules of Civil Procedure 54(a) provides:

> "Judgment" as used in these rules includes a decree and any order from which an appeal lies. . . .

The ***Delta*** court's limitation cannot be found in the plain language of either Rules 54 or 68, and the Court erred when it improperly distinguished between the plaintiff who "takes nothing" and the plaintiff who recovers less than the offer of judgment.

Even assuming that the Court was correct in adding this condition to Rule 68, the District Court erred when it refused to treat LP&L as a victorious plaintiff. Assuming the added requirement of victory, Petitioners should not be precluded from recovery. **The Plaintiff obtained a favorable judgment;** LP&L was awarded $1.5 million in damages plus attorneys' fees and costs totaling more than $4 million against Petitioners' liable co-defendants. Under any circumstance that is a "victorious judgment" and the Petitioners' Offer of Judgment should have been enforced.

Regardless of the validity of the ***Delta*** ruling, the issue arises as to whether ***Delta*** is even applicable to this case. ***Delta*** specifically addressed an action between **a single plaintiff** and **a single defendant** where the defendant was the successful litigant and the plaintiff received $-0-. However, this is not a case where a single plaintiff has lost to a single defendant. Rather, LP&L was successful in this action - - it was

not defeated, obtaining a $1,500,000.00 judgment plus attorneys' fees and costs against co-defendants, Fischbach & Moore, Inc., Fischbach Corporation, Commonwealth Electric Co., The Howard P. Foley Co. and Francis Kellstrom. While LP&L did not obtain a judgment against the Petitioners, LP&L did obtain a judgment in this action. This Court's primary concern in ***Delta*** was the additional burden Rule 68 would place on the plaintiff who recovered nothing. ***Delta***, 450 U.S. at 352, 67 L.Ed.2d at 293. The Court did not want the nonsettling plaintiff to run the risk of suffering additional burdens that do not ordinarily attend an outright defeat as such risk might discourage future plaintiffs from filing suit. **This consideration is not present here**. LP&L was victorious. LP&L should be made to pay the Petitioners' costs, including attorneys' fees, from the spoils of its victory against the co-defendants.

A failure by this court to enforce the Offer of Judgment in this case will emasculate the rule in the context of complex multiparty litigations, precisely the type of action which would benefit from the operation of the rule. If a plaintiff knows that he must only succeed against one of several defendants in order to escape Rule 68 liability to any other defendant, there is no incentive for him to accept an offer of judgment and streamline litigation. Likewise, it is unfair to a multiparty defendant to eliminate the possibility of shortening litigation and controlling liability by requiring him to persuade all of his co-defendants to join in the offer

of judgment for it to have any force. Such a defendant could be denied its rights under Rule 68 by a co-defendant who refuses to allow a judgment to be taken against him. The Fifth Circuit opinion negates the viability of Rule 68 in any multiparty litigation.

[Now Chief] Justice Rehnquist recognized the problems created by the Court in his dissent in the ***Delta*** case, 450 U.S. at 375:

> . . .no policy argument will convince me that a plaintiff who has refused an offer under Rule 68 and that has a "take nothing" judgment entered against her should be in a better position than a similar plaintiff who has refused an offer under Rule 68 but obtained a judgment in her favor, although in a lesser amount than that which was offered pursuant to Rule 68. The construction of Rule 68 urged by the Court would place in a better position a defendant who tendered $10,000 to a plaintiff under Rule 68 in a case where the plaintiff was awarded $5,000 then where the same tender was made and the plaintiff was awarded nothing.

Chief Justice Rehnquist disagreed with the majority of the Court that the "plain language" of the Rule requires such an interpretation. He refused to read into the "plain language" of the statute a requirement that the plaintiff win, and concluded:

> In sum, I would reject the "plain meaning" basis of the Court's opinion interpreting Rule 68 because, in my view, the Rule must be read not only contrary to its "plain meaning" but also woodenly and perversely in order to reach a conclusion that a prevailing defendant who had made an offer pursuant to Rule 68 should be placed in a worse position than one who has lost to the plaintiff and has a judgment entered against him accordingly,

> but for an amount less than the amount tendered under Rule 68.

Delta, 450 U.S. at 379-380.

The issues raised by this unique fact situation must be resolved by this Court. Guidance has to be given as to the application of Rule 68 in a multiparty litigation. The Court erred when it added a requirement of a victorious judgment to the language of Rule 68. Even if the Court's ruling in ***Delta*** is upheld, it falls short of addressing the facts of this case. No court has addressed the application of Rule 68 in a multiparty litigation where the offering defendants were the only defendants against which the Plaintiff did not prevail and where the Plaintiff recovered treble damages, attorneys' fees and costs against remaining co-defendants. Therefore, Petitioners request that this Court find that the Fifth Circuit erred when it affirmed the district court's refusal to award costs incurred, including attorneys' fees, from the date of their Rule 68 Offer of Judgment, July 23, 1992, forward.

II. RULE 68 REQUIRES THE PLAINTIFF TO PAY THE COSTS OF LITIGATION, INCLUDING ATTORNEYS' FEES, OF PREVAILING DEFENDANTS

Under Rule 68, if the plaintiff fails to accept an offer of judgment of a defendant, and later obtains a less favorable result than such offer, he *must pay the costs incurred after the making of the offer*. In this case, LP&L obtained a judgment against five (5) other defendants in

the amount of $1.5 million plus attorneys' fees and costs, with a judgment entered in favor of the Petitioners and against the Plaintiffs. This Court has already determined that attorneys' fees are an element of costs recoverable under Rule 68 in a Title VII action because attorneys' fees are recoverable as an element of costs under 42 U.S.C. §1988. ***Marek v. Chesney***, 473 U.S. 1, 105 S.Ct. 3012, 87 L.Ed.2d 1 (1985). Likewise, attorneys' fees should be recoverable as an element of Rule 68 costs in an antitrust litigation. Petitioners request that this Court extend its reasoning in ***Marek*** to encompass an action brought under the Clayton Antitrust Act.

In ***Marek v. Chesney***, *supra.*, the Court held that "costs" under a Rule 68 offer of judgment include attorney's fees. The Court specifically stated that, "[a]bsent Congressional expressions to the contrary, where the underlying statute defines "costs" to include attorney's fees, we are satisfied such fees are to be included as costs for purposes of Rule 68." 87 L.Ed.2d at 9.

In ***Marek***, the plaintiff sued under 42 U.S.C. §1983. Defendants made an offer of judgment which plaintiff rejected. Plaintiff was successful in the action but recovered less than the offer. Plaintiff sought attorney's fees and costs pursuant to the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988, which provides that, "[i]n any action or proceeding to enforce a provision of section . . .1983. . .of

this title, . . . the court, in its discretion, may allow . . . a reasonable attorney's fees as part of the costs." Defendants objected, in part, to plaintiff's demand as it sought fees and costs incurred after the defendants made an Offer of Judgment. The ***Marek*** defendants based their argument on Rule 68.

Because the underlying statute in ***Marek*** provided for "a reasonable attorney's fee as part of costs," the Court determined that attorney's fees were subject to the cost-shifting provision of Rule 68. ***Marek***, 473 U.S. at 9. In coming to this determination, the Court reasoned:

> In this setting, given the importance of costs, it is very unlikely that this omission [of a definition of costs under Rule 68] was mere oversight; on the contrary, the most reasonable inference is that the term "costs" in Rule 68 was intended to refer to all costs properly awardable under the relevant substantive statute or other authority. In other words, all costs properly awardable in an action are to be considered within the scope of Rule 68 "costs."

Marek, 473 U.S. at 9. (emphasis added).

Such reasoning should extend to an action brought under the Clayton Antitrust Act. Section 15 of the Clayton Antitrust Act provides that:

> Any person who shall have been injured in his business or property . . . by reason of anything forbidden in the antitrust laws . . . shall recover . . . the cost of suit, *including a reasonable attorney's fee."*

15 U.S.C. §15 (emphasis added). In ***Rickards v. Canine Eye Registration Foundation, Inc.***, 783 F.2d 1329, 1334-35 (9th Cir. 1986), ***cert. denied***, 479 U.S. 851 (1986), the Ninth Circuit concluded that costs incurred in the defense of a baseless antitrust suit constitute an "injury" under the antitrust laws. Since this provision clearly permits recovery of attorneys' fees as part of costs, defendants' post-offer attorneys' fees are recoverable under Rule 68 and the Offer of Judgment.

LP&L is required, under the dictates of Rule 68 and the Court's ruling in ***Marek***, supra, to pay to Comstock the costs which it incurred after the Offer of Judgment. These costs include attorneys' fees as attorneys' fees are included in the definition of costs under the Clayton Antitrust Act. 15 U.S.C. 1 *et seq.*

III. COMSTOCK'S OFFER OF JUDGMENT, DATED JULY 22, 1992, WAS TIMELY

An issue not previously determined by this Court is the proper computation of the time for making a Rule 68 offer of judgment, i.e., what is the proper computation of a period of "more than 10 days". Rule 68 requires that an offer of judgment be made "[a]t any time ***more than 10 days before the trial begins,***. . . " [emphasis added]. The phrase "more than 10 days" clearly requires that an offer of judgment be served upon a plaintiff at least eleven (11) days prior to the commencement of trial. This eleven-day period is computed in accordance with Rule 6(a), which

provides that any period **in excess** of ten days is computed by counting all calendar days, but "when the period of time prescribed or allowed is ***less than 11 days***, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation." Fed.R.Civ.P. 6(a).

As the district court recognized, and the docket sheet confirms, the jury trial began with Opening Statements on August 5, 1992. The Offer of Judgment was made on July 22, 1992. For purposes of computing the period of time in which to serve an offer of judgment, the act *from which* the eleven day period begins to run is the commencement of the trial. Rule 68 is different from most rules in that it counts backwards from the trial to the offer date. Therefore, counting August 4th[1], 3rd[2], 2nd[3], 1st[4], July 31st [5], 30th[6], 29th[7], 28th[8], 27th[9], 26th[10], 25th[11], 24th[12], 23[13], and 22nd[14], the difference is 14 days.

Relying on ***Polk v. Montgomery County, Maryland***, 130 F.R.D. 40, 42 (D.Md.1990), the district court in its computation excluded weekends, treating the prescribed time period as one "less than 11 days." Rule 6(a) clearly states that, "Saturdays, Sundays and legal holidays" are only excluded in the computation when the period of time prescribed or allowed is less than eleven (11) days. The district court and the ruling in ***Polk*** are in error. **Rule 68 does *not* prescribe a 10 day limitation period. The Rule says "any time *more* than 10 days."** The definition of the term **"more"** provides:

> 1.a Greater, as in size, number, power;-now only in "the more part."... 2. Existing in greater quantity, amount, degree, quality and the like;-with the singular. . . . 3. Greater or exceeding in numbers;- with the plural. . . .

Webster's New International Dictionary, 2nd Ed., unabridged, 1947, at page 1593.

Rule 6(a) only requires the exclusion of the intermediate Saturdays, Sundays, and legal holidays in the computation when "the period of time prescribed is ***less*** that 11 days." The definition of the term **"less"** provides:

> 1. Smaller; not so much; shorter; inferior; as, a *less* quantity; a horse of *less* value; in *less* time. The substantive which *less* qualifies is often omitted; as, the purse contained *less* (money) than ten dollars. . . 3. Fewer; - now incorrect according to strict usage, except with a collective; as, to wear *less* clothes.

Webster's New International Dictionary, 2nd Ed., unabridged, 1947, at page 1418. It is clear from a plain reading of the Rules that the computation of the timely service of an offer of judgment under Rule 68 includes intermediate Saturdays, Sundays and holidays. Such an interpretation would further the goals of Rule 68. In ***Greenwood v. Stevenson,*** 88 F.R.D. 225, 228 (D.R. I. 1980) the court held:

> The Rule attempts to minimize the economic burden of litigating a case to the bitter end by facilitating an acceptable compromise at some earlier point. Since a late settlement that avoids some of the trial costs would seem to be better than

> no settlement at all, the policy of the Rule would appear best served by selecting the last possible point in time for cutting off Rule 68 offers. ***Cf. Cover v. Chicago Eye Shield Co.***, 136 F.2d 374 (7th Cir. 1943), *cert. denied*, 320 U.S.749, 64 S.Ct. 53, 88 L.Ed. 445 (1943) . . . Indeed, looking purely to the policies embodied in the Rule, one wonders why there should be *any* restriction on when offers of judgment can be made.

88 F.R.D. at 228.

The record reveals that the Comstock defendants served their Offer of Judgment on July 22, 1992. Although trial was set for August 3, 1992, the district court did not begin to hear this case until August 5, 1992, following two days of jury selection.[3] As the district court correctly recognized in its Rulings on Motions on page 2, under Rule 68, trial does ***not*** begin with selection and impaneling of the jury. Rather, "trial begins' when the trial judge calls the proceedings to order and actually commences to hear the case." ***Greenwood***, 88 F.R.D. at 227-229. As noted by the court in ***Greenwood***, this interpretation best furthers the policy of Rule 68, "by permitting offers of judgment to be made, and perhaps accepted, in the intervening periods."

The district court calculated the time period for making an offer of judgment as a ten day period. This is incorrect. Instead, the plain language of the statute reveals that the period is "***more*** than ten days prior to trial . . ." Rule 68 (emphasis added). Therefore, the district court should

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[3] Even counting from August 3, 1992, the date upon which jury selection began, the Offer of Judgment, served 12 days earlier, was still timely.

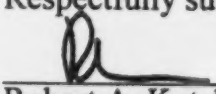
have calculated the period as a period in excess of ten days, taking into account Saturdays, Sundays and legal holidays. This method of calculation is not only clearly intended by the statute, but advances the purpose of the Rule to encourage settlements rather than trials. Comstock served the Offer of Judgment "more than 10 days before the trial" began; they served it 14 days before the trial began. Consequently, the Court's ruling, that the Offer of Judgment was untimely, was in error.

CONCLUSION

Comstock's Rule 68 Offer of Judgment was timely filed and the Petitioners should have been awarded their Rule 68 costs, including attorneys' fees, incurred from July 23, 1992, forward. Any other interpretation of Rule 68 would require an improper reading of the "plain meaning" of Rule 68 and would emasculate the Rule's effectiveness. Guidance from this Court is needed as to the proper interpretation of Rule 68 in a complex multi-party litigation. LP&L clearly did **not** "take nothing" since they were awarded over $5.5 million in this case. There is no policy argument which justifies denying Petitioners' rights under Rule 68 simply because the Plaintiff, while recovering over $5.5 million, recovered nothing against Petitioners. Petitioners also seek a determination of the proper computation of the time for serving an offer of judgment under Rules 68 and 6(a), as well as the scope of costs recoverable under Rule 68 in an antitrust action. Therefore, L. K. Comstock & Company, Inc. and LKC,

Inc. respectfully request this Court to grant their Writ for Certiorari to review important issues of federal law which have not been, but should be settled by this Court and remand this case with orders to the district court to properly award the Petitioners their Rule 68 costs, including attorneys' fees.

Respectfully submitted:



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APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 93-3756

LOUISIANA POWER & LIGHT COMPANY,

Plaintiff-Appellee,

versus

FRANCIS S. KELLSTROM, ET AL.,

Defendants-Appellants.

United States Court of Appeals
Fifth Circuit

Appeal from the United States District Court
for the Eastern District of Louisiana

April 10, 1995

Before WIENER, EMILIO M. GARZA, and BENAVIDES, Circuit Judges.

PER CURIAM:

Louisiana Power & Light Co. ("LP&L") sued multiple defendants[1] for antitrust and RICO violations, and the jury rendered a verdict in LP&L's favor against five defendants[2] and against LP&L on the remainder of its claims. Pursuant to 15 U.S.C. § 15[3] and Fed. R. Civ. P. 54 (d),[4] the district

[1] The defendants were Fischbach & Moore, Inc., Fischbach Corp., Francis S. Kellstrom, Commonwealth Electric Co., Howard P. Foley Co., L.K. Comstock & Co., Inc., LKC, Inc., Commonwealth Cos., John D. Keys, Lewis E. Eastman, J.R. Sturgill, Jr., and Paul M. Murphy.

[2] Fischbach & Moore, Inc., Fischbach Corp., Francis S. Kellstrom, Commonwealth Electric Co., and Howard P. Foley Co.

[3] This section provides:

[A]ny person who shall be injured in his business or property by reason of anything

court awarded attorneys' fees to LP&L on its successful claims and to the prevailing defendants on theirs.[5] Defendants Fischbach & Moore, Inc., Fischbach Corp., and Francis S. Kellstrom (collectively "Fischbach") appeal the award of attorneys' fees to LP&L. Defendants L.K. Comstock & Co., Inc. and LKC, Inc. (collectively "Comstock") appeal the amount of the district court's taxation of costs against LP&L. We affirm in part, modify and affirm in part, and reverse and render in part.

I

In its antitrust and RICO suit, LP&L alleged that the defendants had conspired to rig the electrical bids for the Waterford 3 nuclear power plant project. Shortly before trial, Comstock made an offer of judgment to LP&L under Rule 68 of the Federal Rules of Civil Procedure,[6] which offer LP&L refused. Following approximately six years of pretrial preparation and eight-weeks of trial, the jury found for LP&L on its bid rigging claims against Fischbach, Commonwealth Electric Co., and the Howard P. Foley Co.[7] but found against LP&L on its claims against Comstock. Although LP&L had requested $15-17 million in damages, the jury awarded it only $500,000.[8]

> forbidden in the antitrust laws . . . shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. § 15 (1988).

[4] Rule 54(d) provides:

> Except when express provision therefor is made either in a statute of the United States or in these rules, costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs . . . .

Fed. R. Civ. P. 54(d).

[5] L. K. Comstock & Co. and LKC, Inc. are the only prevailing defendants involved in this appeal.

[6] *See infra* Part II (Comstock Appeal), A.

[7] Commonwealth Electric Co. and the Howard P. Foley Co. are not parties to this appeal.

[8] Under 15 U.S.C. § 15 (1988), this amount was trebled for a total recovery of $1.5 million.

After trial, LP&L filed an application for an award of $281,668.66 in costs and $5,205,296.96 in fees. Comstock filed an application for costs that eventually totalled $71,264.07. Comstock also moved to amend the judgment to include its attorneys' fees based on its Rule 68 offer of judgment.

After receiving multiple motions to review elements of the various cost and fee applications, the district court held a hearing on all such applications. Fischbach challenged portions of LP&L's fee request, and LP&L challenged Comstock's cost request. The district court took the matter under submission and eventually entered its findings and conclusions, awarding $4,182,893.73 in fees and costs to LP&L and $33,743.47 in costs to Comstock but denying Comstock's Rule 68 and Rule 26 requests and Fischbach's Rule 26 request.

Fischbach appeals the award of fees and costs to LP&L, contending that the district court erred by 1) failing to reduce the number of hours awarded; 2) failing to reduce the hourly rates awarded; 3) failing to reduce the lodestar more than it actually did; 4) awarding postjudgment interest from the date of judgment on the merits, rather than from the date of the final fee award; and 5) awarding fees for LP&L's experts' response to discovery while denying the same to Fischbach. Comstock appeals its award of costs, arguing that the district court erred by 1) refusing to award fees under its Rule 68 offer of judgment; 2) awarding fees for LP&L' s experts' response to discovery while denying the same to Comstock; and 3) refusing to award fees and costs for pursuing its cost recovery.

II

The Fischbach Appeal:

Fischbach challenges several elements of the award of attorneys'

fees and costs to LP&L. First, Fischbach asserts that the district court erred in determining the "lodestar" amount by accepting both the total hours and the hourly rates submitted by LP&L. Second, it disputes as inadequate the district court's downward adjustment of the lodestar. Third, Fischbach disagrees with the date chosen by the district court for the start of postjudgment interest. Last, it asserts that the district court should either deny LP&L's costs for experts' response to discovery or grant these costs to both parties.

A

In addressing Fischbach's assertion that the district court erred in its calculation of the base lodestar, we note that determination of reasonable attorneys' fees involves a two-step procedure. See *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S. Ct. 1933, 1939, 76 L. Ed. 2d 40 (1983) Initially, the district court must determine the reasonable number of hours expended on the litigation and the reasonable hourly rates for the participating lawyers. *Id.* Then, the district court must multiply the reasonable hours by the reasonable hourly rates. *Blum v. Stenson*, 465 U.S. 886, 888, 104 S. Ct. 1541, 1544, 79 L. Ed. 2d 891 (1984) (defining base fee to be product of reasonable hours and reasonable rate); *Hensley*, 461 U.S. at 433, 103 S. Ct. at 1939 (defining product of hours reasonably expended and reasonable hourly rates as "[t]he most useful starting point"); *Brantley v. Surles*, 804 F.2d 321, 325 (5th Cir. 1986) (stating hours multiplied by rate to be normal basis for fee). The product of this multiplication is the lodestar, which the district court then either accepts or adjusts upward or downward, depending on the circumstances of the case. *Brantley*, 804 F.2d at 325. Determinations of hours and rates are questions of fact. *See Bode v. United States*, 919 F.2d 1044, 1047 (5th Cir. 1990) (reviewing

hours for clear error). Accordingly, we review the district court's determination of reasonable hours and reasonable rates for clear error. *See Blanchard v. Bergeron*, 893 F.2d 87, 89 (5th Cir. 1990) (reviewing underlying factual determinations for clear error).

1

Fischbach challenges the district court's allowance of certain hours claimed by LP&L. As noted, the first step in determining reasonable attorneys' fees is an evaluation of the number of hours reasonably expended. *Baughman v. Wilson Freight Forwarding Co.*, 583 F.2d 1208, 1214 (3d Cir. 1978). The district court must determine whether the hours claimed were "reasonably expended on the litigation." *Alberti v. Klevenhagen*, 896 F.2d 927, 933-34 (5th Cir.) , *vacated on other grounds*, 903 F.2d 352 (5th Cir. 1990); *see also Hensley*, 461 U.S. at 434, 103 S. Ct. at 1939 ("The district court also should exclude from this initial fee calculation hours that were not 'reasonably expended.'"). Moreover, "the fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates. The applicant . . . should maintain billing time records in a manner that will enable a reviewing court to identify distinct claims." *Hensley*, 461 U.S. at 437, 103 S. Ct. at 1941; *see also Bode*, 919 F.2d at 1047 ("[T]he party seeking reimbursement of attorneys' fees . . . has the burden of establishing the number of attorney hours expended, and can meet that burden only by presenting evidence that is adequate for the court to determine what hours should be included in the reimbursement.").

Accordingly, the documentation must be sufficient for the court to verify that the applicant has met its burden. *Id.* "In determining the amount of an attorney fee award, courts customarily require the applicant to pro-

duce contemporaneous billing records or other sufficient documentation so that the district court can fulfill its duty to examine the application for noncompensable hours." *Id.*; *see also Hensley*, 461 U.S. at 433, 103 S. Ct. at 1939 ("The party seeking an award of fees should submit evidence supporting the hours worked and rates claimed."). Thus a district court may reduce the number of hours awarded if the documentation is *vague or incomplete*. *See Alberti*, 896 F.2d at 931 (refusing to accept incomplete documentation "at face value"); *Leroy v. City of Houston (Leroy I)*, 831 F.2d 576, 585-86 (5th Cir. 1987) (finding clear error and abuse of discretion when district court accepted "faulty records" without making reduction); *cf. Hensley*, 461 U.S. at 433, 103 S. Ct. at 1939 (counseling that "[w]here the documentation of hours is inadequate, the district court may reduce the award accordingly").

Fischbach contends that the district court clearly erred in accepting all of the hours submitted by LP&L. Fischbach first notes that LP&L failed to provide contemporaneous billing records for certain time periods. Specifically, Fischbach points out that LP&L submitted (1) only quarterly summaries for the period from February 1986 to July 1987, totalling $115,070 in requested fees; (2) only month-end summaries for two attorneys during 1987 and 1988, totalling $154,080 in requested fees; (3) no daily time records for November and December 1988, totalling $82,915 in requested fees; and (4) no supporting documentation at all for the $6,465 in fees of one attorney, J.P. Madigan.

Failing to provide contemporaneous billing statements does not preclude an award of fees per se, as long as the evidence produced is adequate to determine reasonable hours. *Heasley v. Commissioner*, 967 F.2d 116, 123 (5th Cir. 1992). After painstakingly reviewing the instant record, we

conclude that the district court failed to determine properly whether some of the hours submitted were reasonably expended and that LP&L failed to satisfy its burden of proving its entitlement to compensation for some of the hours submitted.

The district court stated that it had not "undertake[n] a dollar-by-dollar or an hour-by-hour analysis" of LP&L's records, but that "[a] just and equitable result can be obtained by following existing case law on what constitutes a 'reasonable' attorney's fee." As to the specific items of which Fischbach complains, this appears to fall short of the standard required of district courts.

> The district court is not only required to determine whether the total hours claimed are reasonable, but also whether particular hours claimed were reasonably expended. The court's reference to deeming hours to be reasonably expended is troubling because it strongly suggests that the district court did not abide by this standard. It is not the case that all claimed time is a fortiori reasonably expended if the *total hours* claimed by counsel appear to reflect sound legal judgment and resulted in satisfactory results.

Alberti, 896 F.2d at 932. Similarly, we find somewhat troubling the district court's decision to decline a full analysis on the items complained of; therefore, as to those hours, "[i]t does not appear from this record that the district court determined if particular hours claimed were reasonably expended on the litigation." *Id.* at 933.

Further, LP&L's challenged records do not provide this court with sufficient information to determine whether all of the amounts requested were reasonably expended on this litigation.[9] *See Leroy I*, 831 F.2d at 585

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[9] For example, the documentation for the fourth quarter of 1986 consisted of

(reversing district court's acceptance of total hours where billing records reflected that "some were reconstructed, after-the-fact summaries"). Despite Fischbach's urging us to eliminate entirely the hours covered by the quarterly and monthly summaries and the period of November to December, 1988, we find that the documentation supports an award of some amount of hours. Normally, we would remand to the district court for it to determine an appropriate reduction. Because the record contains sufficient information to allow a fair determination of a reasonable fee, however, we choose to exercise our option to modify the fee award on our own.[10]

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the following summary:

> We traveled to New York and deposed defendants Comstock and LKC,Inc. We reviewed extensive documentation concerning Fischbach & Moore's bids to LP&L, and we deposed Fischbach & Moore in Kenner, Louisiana. We deposed Lord Electric Company in New York City; we traveled to Lincoln, Nebraska and deposed Commonwealth Electric Company. We reviewed transcripts of all these depositions when produced.
>
> We brought formal discovery complaints to the Court and argued them to the Magistrate, who ordered each of the defendants to provide supplemental discovery, which we reviewed. The Magistrate also ordered legal memoranda on the discovery of grand jury materials, which we prepared after research. We reviewed the memoranda filed by others.
>
> We conferred with Company personnel and employees and attorneys for Ebasco services, Inc. concerning interrogatories and requests for documents submitted to LP&L by defendants Fischbach & Moore and Comstock. We reviewed extensive documentation produced by Ebasco and prepared answers and response to defendants' discovery demands. We conferred with opposing counsel and the Magistrate concerning LP&L's production of documents.
>
> We extensively conferred with LP&L' s investigator and reviewed reports concerning other price-fixing litigation involving defendants, and we conferred with other attorneys of other injured parties. We prepared bankruptcy pleadings to obtain discovery from E.C. Ernst Company.

A fee total of $23,900 was submitted for this work. Unfortunately, this documentation provides no basis upon which we could determine if $23,900 or $123,900 or $2,390 was reasonably expended for these services. There is no indication of the number of hours expended per task, by whom, for what, and at what rate. Without such basic information, no Hensley determinations regarding "the reasonable number of hours spent on the litigation and a reasonable hourly rate" can be made. See *Hensley*, 461 U.S. at 433, 103 S. Ct. at 1939.

[10] *See Leroy I*, 831 F. 2d at 585-86 (vacating district court judgment and

Therefore, in the exercise of our discretion and after a careful analysis of the record and the determinations of the district court, we deem appropriate a ten percent reduction for inadequate documentation of the hours and fees requested for 1) February 1986 to July 1987, 2) month-end summary entries by Attorneys Slater and Stevenson during 1987 and 1988, and 3) November and December 1988. As for the request for hours for Attorney Madigan, however, the record is virtually devoid of any information helpful to a determination of whether or how his hours were spent beneficially on this litigation. We accordingly deny any award of attorneys' fees based on the hours submitted for Attorney Madigan.

Fischbach also challenges several entries as too vague to support a determination whether or how they were spent on this litigation. The district court may properly reduce or eliminate hours when the supporting documentation is too vague to permit meaningful review. *See Leroy v. City of Houston (Leroy II)*, 906 F.2d 1068, 1080 (5th Cir. 1990) (striking hours as "not illuminating as to the subject matter" or "vague as to precisely what was done"); *Leroy I*, 831 F.2d at 585-86 (reversing when district court accepted all hours from records that were "scanty," completely missing, or lacking in explanatory detail) ; *see also HJ, Inc.*, 925 F.2d at 260 (reducing hours for vague entries such as "legal research," "trial preparation," and "met with client").

After reviewing the instant record, we agree that many entries in LP&L's time records are indeed scanty as to subject matter.[11] Nonethe-

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remanding for entry of amended award); *Cobb v. Miller*, 818 F. 2d 1227, 1235 (5th Cir. 1987) (reversing district court and rendering judgment on fee award); *see also Home Placement Serv. v. Providence Journal Co.*, 819 F.2d 1199, 1211 (1st Cir. 1987) (opting to modify fee award rather than remand).

[11] LP&L's records contain vague entries such as "revise memorandum," "re-

less, our case law has not precisely defined the appropriate standard, if in fact it is susceptible of being thus defined. Accordingly, "not illuminating as to the subject matter" or "vague as to precisely what was done" gives the district court sufficient leeway within which to *accept or reject* fee applications similar to that submitted by LP&L. Litigants take their chances when submitting such fee applications, as they provide little information from which to determine the "reasonableness" of the hours expended on tasks vaguely referred to as "pleadings," "documents," or "correspondence" without stating what was done with greater precision. *See Hensley*, 461 U.S. at 434, 103 S. Ct. at 1939 (instructing district

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view pleadings," "review documents," and "correspondence." Specifically, we find the following hours lack the required specificity to support completely the fees requested:

Slater:	290.75 hours, totalling $66,348.75 in fees
Stevenson:	229.25 hours, totalling $47,442.50
O'Keefe:	19.7 hours, totalling $3622.50
Lewis:	0.3 hours, totalling $67.50
O'Brien:	2.8 hours, totalling $490.00 96.0
Staub:	96.0 hours, totalling $16,140.00
Burns:	6.0 hours, totalling $960.00
Thomas:	7.0 hours, totalling $980.00
Rodriguez:	36.0 hours, totalling $5040.00
McGrew:	1.3 hours, totalling $182.00
Van Horn:	0.5 hours, totalling $60.00
Chalker:	32.0 hours, totalling $3840.00
McAlister:	1.0 hours, totalling $120.00
Schooley:	52.0 hours, totalling $5200.00
Brown:	1.75 hours, totalling $175.00
Friend:	124.04 hours, totalling $12,404.00
Readinger:	236.25 hours, totalling $11,812.50
Walker:	42.15 hours, totalling $2107.50
Pate:	32.25 hours, totalling $1612.50
Hughs:	61.75 hours, totalling $2778.75
Carrigan:	5.0 hours, totalling $225.00
Goodwin:	33.8 hours, totalling $1521.00
Evans:	9.05 hours, totalling $407.25
Helwig:	30.75 hours, totalling $1383.75
Gullo:	0.35 hours, totalling $15.75
Whittington:	0.5 hours, totalling $22.50
Fleming:	4.25 hours, totalling $191.25

court to exclude hours not "reasonably expended").

Viewing the time records as a whole, however, and given the district court's familiarity with this case, including the quality of the attorneys' work over a period of several years, we cannot say that the district court clearly erred in refusing to reduce the hours in question for vagueness. These entries may border on inadequacy as a matter of law, but we are mindful that practical considerations of the daily practice of law in this day and age preclude "writing a book" to describe in excruciating detail the professional services rendered for each hour or fraction of an hour. We also recognize that, in this era of computerized time keeping, many data processing programs limit the amount of input for any given hourly or daily entry. Nevertheless, attorneys who anticipate applying for reimbursement of fees should endeavor to be less terse.

In addition to criticizing LP&L's records as inadequate and vague, Fischbach also complains that the district court failed to exclude hours that LP&L expended litigating against the other defendants. A prevailing litigant may not recover for hours devoted solely to claims against other parties. *See Hensley*, 461 U.S. at 434-35, 103 S. Ct. at 1940 (work on unsuccessful claim not compensable); *Baughman*, 583 F.2d at 1214 (defendant relieved from compensating plaintiff for hours expended litigating against other defendants). But when claims against multiple parties share a "common core of facts" or "related legal theories," a fee applicant may claim all hours reasonably necessary to litigate those issues. *Hensley*, 461 U.S. at 434-35, 103 S. Ct. at 1940.[12]

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[12] See also *City of Riverside v. Rivera*, 477 U.S. 561, 570, 106 S. Ct. 2686, 2692, 91 L. Ed. 2d. 466 (1986) (finding common core of facts); *Abell v. Potomac Ins. Co.*, 946 F.2d 1160, 1169 (5th Cir. 1991) ("[W]here time spent on unsuccessful issues is difficult to segregate, no

Proving an antitrust case involves demonstrating collusion among multiple defendants; this requires the plaintiff to prove the same facts and issues against several parties to recover against any one party. *See* 15 U.S.C. § 2 (1988) (defining violation for persons who "combine or conspire"). We are here satisfied that LP&L's claims against the other defendants involved a common core of facts, and that LP&L was thus entitled to claim the hours it spent litigating against the other defendants. Consequently, we conclude that the district court did not err in refusing to sift through LP&L's hours and eliminate those spent in litigation against the other defendants.[13]

2

Next, Fischbach challenges the district court's determination of the hourly rates awarded to LP&L. This too we review for clear error. *Powell v. Commissioner*, 891 F.2d 1167, 1173 (5th Cir. 1990) (holding that determination of reasonable rates is question of fact, subject to clear error standard); *Islamic Ctr. v. City of Starkville*, 876 F.2d 465, 468 (5th Cir. 1989) (using clear error standard to evaluate hourly rates awarded). To determine reasonable rates, a court considers the attorneys' regular rates as well as prevailing rates. *HJ, Inc.*, 925 F.2d at 260 (considering regular rates as

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reduction of fees is required."), *cert. denied*, ___U.S.___, 112 S. Ct. 1944, 118 L. Ed. 2d 549 (1992); *Nash v. Chandler*, 848 F.2d 567, 572 (5th Cir. 1988) (finding no clear error where unsuccessful claims "highly relevant" to successful claim); *Cobb v. Miller*, 818 F.2d 1227, 1233 (5Th Cir. 1987) (holding claims against multiple defendants compensable because interrelated).

[13] When a plaintiff's claims cannot be disentangled, the district court's focus should shift to the results obtained and adjust the lodestar accordingly. *Hensley*, 461 U.S. at 436-37, 103 S. Ct. at 1941 ("The district court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success."); *HJ, Inc.*, 925 F. 2d at 260 (permitting district court to either cut non-successful hours or reduce lodestar to reflect success); *United States Football League v. National Football League*, 887 F.2d 408, 414 (2d Cir. 1989) (holding that district court did not abuse discretion in reducing lodestar rather than cutting nonsuccessful hours), *cert. denied*, 493 U.S. 1071, 110 S. Ct. 1116, 107 L. Ed. 2d 1022 (1990). We address this issue infra in section B.

well as prevailing rates); *Laffey v. Northwest Airlines*, Inc., 746 F.2d 4, 23 (D.C. Cir. 1984) (calling for "reference to the customary billing rate followed by comparison to the prevailing community rate to ensure that the attorney's customary rate is reasonable"), *cert. denied*, 472 U.S. 1021, 105 S. Ct. 3488, 87 L. Ed. 2d 622 (1985). During the latter part of the instant litigation, LP&L's attorneys reduced the hourly rates they charged by 25% in exchange for a contingent share of any eventual recovery. In its fee application, however, LP&L requested its attorneys' usual rate.[14]

> When an attorney's customary billing rate is the rate at which the attorney requests the lodestar be computed and that rate is within the range of prevailing market rates, the court should consider this rate when fixing the hourly rate to be allowed. When that rate is not contested, it is *prima facie* reasonable. When the requested rate of compensation exceeds the attorney's usual charge but remains within the customary range in the community, the district court should consider whether the requested rate is reasonable.

Islamic, 876 F.2d at 469; see also Powell, 891 F.2d at 1175 (holding customary billing rate to be *prima facie* reasonable). After due consideration, the district court found that LP&L's requested rate was reasonable. Fischbach argues that LP&L should not recover any amount in excess of the fees actually paid.[15] Otherwise, Fischbach contends, LP&L will receive a windfall. Attorneys' fees awards should not provide a windfall to

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[14] LP&L also submitted affidavits from other local attorneys supporting its rate request.

[15] Fischbach characterizes LP&L's requested rate as an improper "multiplier" or "contingency enhancement." see *Pennsylvania v. Delaware Valley Citizens' Council*, 483 U.S. 711, 731, 107 S. Ct. 3078, 3089, 97 L. Ed. 2d 585 (1987) (holding enhancements generally inappropriate). The enhancements in these cases, however, refer to requests for multipliers in excess of a reasonable rate. Therefore, Fischbach's argument is inapplicable to the facts of this case.

plaintiffs. *See Hensley*, 461 U.S. at 430 n.4, 103 S. Ct. at 1938 n.4 (explaining statutory goal of avoiding windfalls to attorneys); *see also Riverside*, 477 U.S. at 580, 106 S. Ct. at 2697 ("Congress intended that statutory fee awards be 'adequate to attract competent counsel, but . . . not produce windfalls to attorneys.'" (quoting S. Rep. No. 1011, 94th Cong., 2d Sess. 6 (1976), *reprinted* in 1976 U.S.C.C.A.N. 5913)). Nevertheless, the actual amount paid in fees is not dispositive on the question of reasonable rates. *See Blum v. Stenson*, 465 U.S. 886, 895-96, 104 S. Ct. 1541, 1547, 79 L. Ed. 2d 891 (1984) (determining that courts should use market rates, not cost-based rates); *Alizadeh v. Safeway Stores, Inc.*, 910 F. 2d 234, 238 n.6 (5th Cir. 1990) (suggesting that "attorneys' fees awards are not always purely compensatory in nature"); *Brantley v. Surles*, 804 F.2d 321, 327 (5th Cir. 1986) ("That the amount of the fee award exceeds the amount billed by opposing counsel is also not determinative."). In *Blanchard v. Bergeron*,[16] the Supreme Court refused to limit trial judges to the contract between the plaintiff and his counsel. 489 U.S. at 96, 109 S. Ct. at 946. "Should a fee agreement provide less than a reasonable fee . . . . the defendant should nevertheless be required to pay the higher [market-based) amount." *Id.* at 93, 109 S. Ct. at 944.

The issue we review on appeal here is not how much the attorneys charged but whether the fees awarded by the district court are reasonable; if they are reasonable, then by definition there will be no windfall. *Id.* at 96, 109 S. Ct. at 946. Moreover, "[t]he established rates represent the opportunity cost of what the firm turned away in order to take the litigation." *Laffey*, 746 F.2d at 24. Our review of the record reveals that both the rates charged

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[16] 489 U.S. 87, 109 S. Ct. 939, 103 L. Ed. 2d 67 (1989).

and the rates requested were well within the range of prevailing rates in the community. The district court approved the requested rates, and we find no clear error in this choice.

B

Fischbach also challenges the district court's adjustment of the lodestar.[17] We review lodestar adjustments for abuse of discretion. *Palmco Corp. v. American Airlines, Inc.*, 983 F.2d 681, 688 (5th Cir. 1993) (reviewing award of attorneys' fees for abuse of discretion). "It remains important, however, for the district court to provide a concise but clear explanation of its reasons for the fee award." *Hensley*, 461 U.S. at 437, 103 S. Ct. at 1941; *see also Brantley*, 804 F.2d at 325-26 ("Our concern is not that a complete litany be given, but that findings be complete enough to assume a review which can determine whether the court has used proper factual criteria in exercising its discretion to fix just compensation."); *Nisby v. Commissioners Court*, 798 F. 2d 134, 137 (5th Cir. 1986) ("When the district court does not explain its reasons for the attorney's fee it awards, we are unable adequately to review the propriety of the fee award."); *Baughman*, 583 F.2d at 1219 (requiring explanation of district court's adjustment of lodestar).

We therefore inspect the district court's lodestar analysis only to determine if the court sufficiently considered the appropriate criteria. Moreover, Fischbach bears the burden of showing that further reduction is warranted. *See USFL*, 887 F.2d at 413 ("[A] party advocating the

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[17] The district court reduced the lodestar 15% for overstaffing and made no other adjustments.

[18] 488 F.2d 714 (5th cir. 1974).

[19] The factors include: 1) the time and labor required for the litigation; 2) the

reduction of the lodestar amount bears the burden of establishing that a reduction is justified.").

Adjustment of the lodestar in this Circuit involves the assessment of a dozen factors. Our opinion in *Johnson v. Georgia Highway Express, Inc.*[18] identifies these factors.[19]

Primarily, Fischbach contests the district court's refusal to reduce the lodestar to reflect LP&L's "limited success," the eighth of the *Johnson* factors. In considering this factor, the district court ruled:

> The results obtained, though disappointing to plaintiff in quantum, were nonetheless significant. The amount involved, the $15-17 million sought as opposed to $500,000 awarded by the jury is not insignificant for inherent therein is the principle of the matter. . . . [I]t should be remembered that in this instance the plaintiff is entitled to a mandatory fee shifting award, not a discretionary one based on limited success achieved.
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> ...
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> Significant here is the fact that plaintiff exposed the rapacious avarice of educated executives and professionals. . . . Such conduct cuts the thread of the fabric of our society and consequences invariably get borne by the citizenry. The Court considers exposure of this antitrust violation and racketeering activity to be an important and highly significant result obtained.[20]

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novelty and complication of the issues; 3) the skill required to properly litigate the issues; 4) whether the attorney had to refuse other work to litigate the case; 5) the attorney's customary fee; 6) whether the fee is fixed or contingent; 7) whether the client or case circumstances imposed any time constraints; 8) the amount involved and the results obtained; 9) the experience, reputation, and ability of the attorneys; 10) whether the case was "undesirable;" 11) the type of attorney-client relationship and whether that relationship was long-standing; and 12) awards made in similar cases. 488 F.2d at 717-719.

[20] The district court's implication that, as to the limited success factor, some distinction exists between mandatory and discretionary fee shifting is, at most, unfortunate surplusage; the portion of the court's findings and conclusions that follow demonstrate beyond cavil that the court did indeed "consider" LP&L's degree of success and implicitly explained why there was no additional lodestar reduction on account of it.

Moreover, in commenting on various cases cited by the parties, the district court mentioned with approval language such as "recovery of the [] reasonable attorney' s fees must be sustained regardless of the amount of damages awarded."[21]

Fischbach contends that the district court misapplied the law when it refused to reduce the lodestar for LP&L's limited success. *See Farrar v. Hobby*,___U.S.___, ___, 113 S. Ct. 566, 574, 121 L. Ed. 2d 494 (1992) (calling the degree of success the most crucial element in determining the amount of a reasonable fee); *Hensley*, 461 U.S. at 440, 103 S. Ct. at 1943 ("A reduced fee award is appropriate if the relief, however significant, is limited in comparison to the scope of the litigation as a whole.").

But it is one thing to *consider* a factor (which is required) and quite another to act upon it (which is discretionary with the district court). In his partial dissent, Judge Garza makes the unqualified statement that the district court "did not even consider the magnitude of LP&L's success" -a statement that is puzzling in light of the portion of the district court's opinion that is quoted in the text accompanying note 20 supra. When that court's analysis and pronouncements are read in the context of the deferential abuse-of-discretion standard that we must apply when reviewing this issue, we cannot help but disagree with Judge Garza's statement. Not only did the district court expressly advert to the magnitude of LP&L's recovery, reciting the quantums of both the demand and the recovery; that court expressly "considered" the significance of the

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[21] Citing *United States Football League v. National Football League*, 887 F.2d 408 (2d Cir. 1989), *cert. denied*, 493 U.S. 1071, 110 S. Ct. 1116, 107 L. Ed. 2d 1022 (1990). USFL, however, does not stand for the proposition that all fees requested by a prevailing antitrust plaintiff are reasonable; therefore, the language quoted by the district court does not necessarily support its conclusion.

countervailing, non-pecuniary aspects of LP&L's victory, and also explained, at least implicitly, why it made no additional reduction to the lodestar. If, in its discretion, the district court had made a reasonable reduction of the lodestar for limited success, we undoubtedly would have affirmed that decision as being a proper exercise of discretion: As we and Judge Garza note, such a reduction is "appropriate" under *Hensley*. But "appropriate" is not synonymous with "required. Inasmuch as the district court here clearly did consider limited success and explain its reasons for not further reducing the lodestar therefor, that court cannot be said to have abused its discretion for failure to reduce the lodestar on the basis of that considered factor.

We acknowledge at the outset that, to a degree, the district court's ruling appears to confuse determination of the *right* to recover fees with determination of the reasonable amount of that fee. *See Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 793, 109 S. Ct. 1486, 1494, 103 L. Ed. 2d 866 (1989) ("[T]he degree of the plaintiff's overall success goes to the reasonableness of the award . . . , not to the availability of a fee award *vel non*."); *Ingalls Shipbuilding, Inc. v. Director, Office of Workers' Compensation Programs*, 991 F.2d 163, 166 (5th Cir. 1993) (applying "limited success" analysis to mandatory fee shifting statute); [22] *see also George Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 1536 (D.C. Cir. 1992) (holding that *Hensley* standard regarding amount of reasonable fee applies to all fee shifting statutes, including mandatory ones).[23]

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[22] The statute at issue in *Ingalls* was the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901-950 (1988). Like the Clayton Act, see 15 U.S.C. § 15 (1988), the LHWCA provides that a successful plaintiff "*shall* be awarded a reasonable attorney's fee . . . ." 33 U.S.C. § 928(a) (1988) (emphasis added).

[23] Neither case cited by the district court mandates an opposite conclusion. *Sciambra v. Graham News*, 892 F.2d 411 (5th cir. 1990), only discussed the right to fees, not the

Although the district court found that LP&L's limited victory was "an important and highly significant result obtained," the Supreme Court has held that a finding of significant result alone does not satisfy the district court's duty to evaluate the magnitude of that result.

> We are unable to affirm the decisions below, however, because the District Court's opinion did not properly consider the relationship between the extent of success and the amount of the fee award. The court's finding that 'the [significant] extent of the relief clearly justifies the award of a reasonable attorney's fee' does not answer the question of what is 'reasonable' in light of that level of success. We emphasize that the inquiry does not end with a finding that the plaintiff obtained significant relief. A reduced fee award is appropriate if the relief, however, significant, is limited in comparison to the scope of the litigation as a whole.

Hensley, 461 U.S. at 438-39, 103 S. Ct. at 1942-43 (emphasis added); *see also Blum*, 465 U.S. at 900, 104 S. Ct. at 1549 (criticizing fee award because although the award "was based in part on the District Court's determination that the ultimate outcome of the litigation 'was of great benefit to a large class of needy people,'" the district court "did not explain . . . exactly how this determination affected the fee award"). In that respect, the district court's finding here appears to fall a bit short of the required analysis. The court's analysis also appears to fall short in another

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amount thereof. Indeed, *Sciambra* explicitly declined to address a "limited success" argument because it was not timely made. *Id.* at 417. *United States Football League v. National Football League*, 887 F.2d 408 (2d Cir. 1989), *cert. denied*, 493 U.S. 1071, 110 S. Ct. 1116, 107 L. Ed. 2d 1022 (1990), does state that the nominal damages received "does not affect the entitlement to an award," but it also states that limited results "may be a factor used in reducing a fee award." (emphasis added).

LP&L also urges us to affirm the district court's award because a fee award need not be proportional to the damages to be reasonable. *See Meineke Discount Muffler v. Jaynes*, 999 F. 2d 120, 126 (5th Cir. 1993) ("[T]he disparity of these amounts . . . alone will not support a reversal . . ."). The issue here, however, is not whether the award should be reversed because it is *disproportional*, but whether it is reasonable in light of all factors, one of which is the degree of success obtained.

respect: LP&L failed to recover at all from several defendants; and if the district court considered this facet of this shortfall in LP&L's success, it did not clearly indicate that it did so. *See supra n. 15.* Nevertheless, we are not prepared to find that the district court failed to *consider* LP&L's relatively limited success; neither are we prepared to hold that the court abused its discretion in refusing to reduce LP&L's lodestar further to reflect less than total success, either monetarily or against all defendants. We find important the fact that degree of success is but one of 12 *Johnson* factors, and that in our deferential testing of the discretion of the court we look only to consideration of that factor without requiring that a reduction in lodestar necessarily follow. We, therefore affirm the district court's handling of limited success and its effect-or lack thereof -on the lodestar factor in this case.

Fischbach also asserts generally that the district court failed to consider sufficiently other *Johnson* factors. A district court's *Johnson* analysis, however, need not be meticulously detailed to survive appellate review: "If the district court has articulated and clearly applied the criteria . . . , we will not require the trial court's findings to be so excruciatingly explicit in this area of minutiae that decisions of fee awards consume more paper than did the cases from which they arose." *Blanchard*, 893 F.2d at 89; *see also Longden v. Sunderman*, 979 F.2d 1095, 1100 (5th Cir. 1992) (finding no abuse when district court discussed each factor); *Cobb v. Miller*, 818 F.2d 1227, 1232 (5th Cir. 1987) (refusing to reverse award when, although district court did not analyze every *Johnson* factor, the "district court has utilized the Johnson framework as the basis of its analysis, has not proceeded in a summary fashion, and has arrived at an amount that can be said to be just compensation") . As in the instance of the limited success factor, the district court did not abuse its discretion when it

refused to reduce the lodestar further on the basis of its consideration of the other *Johnson* factors.

C

Fischbach next contends that the district court should have awarded postjudgment interest only from the date of the order quantifying the fee award, rather than from the date of the underlying judgment. 28 U.S.C.§ 1961 (1988) provides that postjudgment "interest shall be calculated from the date of the entry of the judgment . . . ." The question here is whether the judgment on the merits or the supplemental judgment verifying the fee award should be used. In *Copper Liquor, Inc. v. Adolph Coors Co.*, 701 F.2d 542 (5th Cir. 1983) (en banc), we stated:

> The relevant judgment for purposes of determining when interest begins to run is the judgment establishing the right to fees or costs, as the case may be. . . . If, as in the usual course, the amount of costs is later determined by the clerk, interest will nonetheless run from the date of the judgment allowing costs either expressly or by legal implication. If a judgment is rendered that does not mention the right to attorneys' fees, and the prevailing party is unconditionally entitled to such fees by statutory right, interest will accrue from the date of judgment.

Id. at 544-45.[24]

In Kaiser Aluminum & Chemical Corp. v. Bonjorno,[25] the Supreme Court refused to calculate interest from the date of an original judgment that was invalidated because it was not supported by the evidence. 494 U.S. at 835-36, 110 S. Ct. at 1576. "Where the judgment on damages was not supported by the evidence, the damages have not been

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[24] Because LP&L recovered under a mandatory fee shifting statute, it became entitled to fees on the date of judgment on the merits.

[25] 494 U.S. 827, 110 S. Ct. 1570, 108 L. Ed. 2d 842 (1990).

'ascertained' in any meaningful way." *Id.* Fischbach contends that, because attorneys' fees are not quantified at the time of the judgment on the merits, *Kaiser* must have overruled *Copper Liquor*. Since *Kaiser*, three Circuits have addressed this issue. The Seventh and Tenth Circuits held that *Kaiser* does supersede *Copper Liquor*.[26] The Eighth Circuit disagreed,[27] deciding that *Kaiser* did not squarely address the issue in *Copper Liquor*. *Jenkins*, 931 F.2d at 1276 n.3. We agree with the Eighth Circuit. Because the earlier judgment in *Kaiser* was invalid, the party had no entitlement to damages on that date. Thus, the reasoning in *Kaiser* is consistent with *Copper Liquor's* mandate that interest should not accrue until the party becomes entitled to the award. Indeed, *Copper Liquor* and *Kaiser* are consistent in that in neither case does interest accrue for amounts later reversed. *See Copper Liquor*, 701 F.2d at 545 ("If a judgment for attorneys' fees is later modified by the district court or an appellate court, whether the award is increased or reduced, interest on the revised award will run from the date of the original judgment unless, of course, the allowance of any amount is reversed."). We therefore hold that *Kaiser* did not overrule *Copper Liquor*, so that the district court here did not err in awarding postjudgment interest from the date of the judgment on the merits.

D

In its final challenge, Fischbach contests the award of $45,330.96 in fees for LP&L's experts' response to discovery. Ordinarily, recovery of expert fees is limited to the statutory amounts authorized under 28

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[26] *Midamerica Fed. Sav. & Loan Ass'n v. Shearson/American Express, Inc.*, 962 F.2d 1470, 1476 (10th Cir. 1992) (stating that "[k]ey to the Kaiser holding is the date damages are 'ascertained' in a meaningful way"); *Fleming v. County of Kane*, 898 F.2d 553 (7th Cir. 1990) (awarding interest from date of award of fees).

[27] *Jenkins v. Missouri*, 931 F.2d 1273, 1276-77 (8th Cir.) (adopting *Copper Liquor* rule), cert. *denied*, ___U.S.___ 112 S. Ct. 338, 116 L. Ed. 2d 278 (1991).

U.S.C. § __ 1821 and 1920. *See Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 439, 107 S. Ct. 2494, 2496, 96 L. Ed. 2d 385 (1987) ("[W]hen a prevailing party seeks reimbursement for fees paid to its own expert witnesses, a federal court is bound by the limit of § 1821(b), absent contract or explicit statutory authority to the contrary."); *see also West Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83,___,111 S. Ct. 1138, 1140-41, 113 L. Ed. 2d 68 (1991) (limiting witness fees to statutory amounts, absent express statutory authority).

Rule 26(b)(4)(c), however, provides an independent basis for recovery of expert fees as part of discovery. *See* Fed. R. Civ. P. 26(b)(4)(c);[28] *see also Chambers v. Ingram*, 858 F.2d 351, 361 (7th Cir. 1988) (affirming award of Rule 26(b)(4)(c) costs as separate from § 1821 witness fees). Accordingly, the district court correctly granted LP&L' s request for Rule 26 (b)(4)(c) costs.

But Rule 26(b)(4)(c) applies to both parties, not just to the prevailing party. The district court should also have awarded Rule 26 (b)(4)(c) costs to Fischbach. The court considered this argument but found the issue moot, concluding that, even if Fischbach was entitled to these costs, LP&L could have recovered them under the fee shifting provisions of the antitrust laws. See 15 U.S.C.§ 15 (1988) (allowing recovery of cost of suit). We disagree.

Previously, we have allowed a prevailing antitrust plaintiff to recover all expenses of the litigation. *See, e.g., Copper Liquor, Inc. v. Adolph Coors Co.*, 684 F.2d 1087, 1100 (5th Cir. 1982) (holding that "the Clayton

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[28] Rule 26(b)(4)(c) provides:
[T]he court shall require that the party seeking discovery shall pay the expert a reasonable fee for time spent in responding to discovery .... Fed. R. Civ. P. 26(b)(4)(c).

Act embraces all the ordinary and reasonable expenses of litigation"), modified on other grounds on appeal after remand, 701 F.2d 542 (5th Cir. 1983). In *West Virginia University Hospitals, Inc. v. Casey*,[29] however, the Supreme Court ruled that a prevailing plaintiff cannot recover expert fees under a fee shifting statute unless the statute expressly provides for the recovery of expert fees. 499 U.S. at ___, 111 S. Ct. at 1141-43 (absent specific statutory authorization, shifting of attorneys' fees does not include expert witness fees). We therefore conclude that expert fees are Rule 26(b)(4)(c) costs and are not recoverable under *Casey*. Consequently, we reverse the district court's denial of Fischbach's entitlement to recover Rule 26(b)(4)(c) costs. And, as Fischbach documented its costs and LP&L did not refute the quantum, we render judgment in favor of Fischbach and against LP&L in the requested amount of $10,994.21 for Fischbach's expert witness expenses.

The Comstock Appeal:

Comstock challenges several elements of the district court's final award of costs and fees. First, it contests the denial of Rule 68 fees. Second, Comstock disputes the final assessment of certain elements of the taxation of costs. Last, it insists that the district court neglected to award fees and costs that Comstock incurred in connection with the instant fee and costs portion of the suit.

A

Comstock argues that the district court erred in ruling that it should not recover fees and costs from LP&L under Rule 68 of the Federal Rules of Civil Procedure. Interpretation of Rule 68 is an issue of law which we review *de novo*. *Knight v. Snap-On Tools Corp.*, 3 F.3d 1398, 1404 (10th

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[29] 499 U.S. 83, 111 S. Ct. 1138, 113 L. Ed. 2d 68 (1991).

Cir. 1993); *Erdman v. Cochise County,* 926 F.2d 877, 879 (9th Cir. 1991). Rule 68 states:

> At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party.... If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment .... If the judgment finally obtained by the offeree is not more favorable than the offer the offeree must pay the costs incurred after the making of the offer....

Fed. R. Civ. P. 68.

The purpose of Rule 68 is to encourage the settlement of litigation by providing an incentive to settle "in those cases in which there is a strong probability that the plaintiff will obtain a judgment but the amount of the recovery is uncertain." *Delta Airlines, Inc. v. August*, 450 U.S. 346, 352, 101 S. Ct. 1146, 1150, 67 L. Ed. 2d 287 (1981). Rule 68 requires a prevailing plaintiff to pay the costs of litigation "in the single circumstance where the plaintiff does not accept the defendant's offer of judgment which is more favorable than the judgment the plaintiff ultimately obtains." *Johnston v. Penrod Drilling Co.*, 803 F. 2d 867, 869 (5th Cir. 1986) Consequently, when a plaintiff rejects a Rule 68 offer of judgment, "he will lose some of the benefits of victory if his recovery is less than the offer." *Delta,* 450 U.S. at 352, 101 S. Ct. at 1150.

If a plaintiff takes nothing, however, Rule 68 does not apply. In *Delta Airlines, Inc. v. August,*[30] the Supreme Court limited Rule 68 to

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[30] 450 U.S. 346, 101 S. Ct. 1146, 67 L. Ed. 2d 287 (1981).

cases in which a plaintiff obtains a judgment against the defendant; the rule is not applicable when a defendant actually prevails over the plaintiff. *See* 450 U.S. at 351-52, 101 S. Ct. at 1149-50 (finding Rule 68 "simply inapplicable to this case because it was the defendant that obtained the judgment") ; *see also Landon v. Hunt*, 938 F.2d 450, 452 n.1 (3d Cir. 1991) (commenting that defendant could not recover under Rule 68 when plaintiff's claim was dismissed); *Allen v. United States Steel Corp.*, 665 F.2d 689, 697 (5th Cir. 1982)(refusing Rule 68 costs to a defendant who prevailed). The Court noted that costs are usually assessed against a losing plaintiff as a normal incident of defeat but that this exception is created so that "a nonsettling plaintiff does not run the risk of suffering additional burdens that do not ordinarily attend to a defeat . . . ." 450 U.S. at 352, 101 S. Ct. at 1150.

Comstock contends that it should recover Rule 68 costs because, instead of a take nothing judgment, LP&L recovered $500,000. Comstock argues that *Delta* is inapplicable because LP&L was not defeated, and it should lose some of the "benefits of victory" for failing to accept Comstock's reasonable offer of judgment.

Here, plaintiff LP&L's recovery was against other defendants, however; plaintiff LP&L took nothing against defendant Comstock. In other words, defendant Comstock actually prevailed totally against plaintiff LP&L. Comstock has not presented any argument that would compel a Rule 68 comparison of its offer of judgment to LP&L and the judgment that LP&L obtained against other defendants. Rule 68 operates by comparing two clearly defined amounts. *Johnston*, 803 F.2d at 870. This comparison is of the "money or property," including "costs then accrued," set out in the offer and the "judgment finally obtained by the offeree." Fed. R. Civ. P. 68.

Accordingly, Rule 68 compares the amount of an offer of judgment, whether made by one defendant or jointly made by multiple defendants,[31] and the amount of the judgment, if any, taken by the offeree against the offeror or offerors. If no judgment is taken by the offeree plaintiff against the offeror defendant or joint offeror defendants, the Delta rule applies.

Comstock made an offer of judgment to LP&L, and LP&L took nothing against Comstock. LP&L's recovery against other non-offeror defendants - none of which were joint offerors with Comstock - is irrelevant to the Rule 68 inquiry. Consequently, Comstock cannot recover its fees under Rule 68.[32]

B

Additionally, Comstock challenges the district court's approval of the clerk of court's final taxation of costs against LP&L, arguing that the clerk erroneously struck certain items. We will not overturn the district court's taxation of costs absent a clear abuse of discretion. *Nissho-Iwai Co. v. Occidental Crude Sales, Inc.*, 729 F.2d 1530, 1551 (5th Cir. 1984); *Studiengesellschaft Kohle mbh v. Eastman Kodak Co.*, 713 F.2d 128, 131 (5th Cir. 1983). Although Rule 54(d) of the Federal Rules of Civil Procedure directs a district court to award costs to a prevailing party,[33] that court

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[31] We have previously encountered the question whether recovery against one defendant may apply to a Rule 68 determination with respect to another defendant-offeror. In *Johnston v. Penrod Drilling Co.*, 803 F.2d 867, 870 (5th Cir. 1986), two defendants made an unapportioned joint offer of judgment to the plaintiff. We vacated the district court's decision because it had not included the settlement against the first defendant in the Rule 68 calculation for the second defendant. *Johnston* is distinguishable, however, because the settlement was made with a joint *offeror*, not with an unrelated defendant.

[32] Comstock also appealed the district court's finding that its Rule 68 offer of judgment was not timely. Our decision regarding the applicability of *Delta* renders that issue moot.

[33] Rule 54(d) provides:
Except when express provision therefor is made either in a statue of the United States or in these rules, costs other than attorneys' fees shall be allowed to the

cannot award any costs not authorized by statute. "[E]xpenditures for those categories of expenses listed in 28 U.S.C. § 1920 may be recovered only if they are allowed by that section. *Copper Liquor, Inc. v. Adolph Coors Co.*, 684 F.2d 1087, 1101 (5th Cir. 1982). Section 1920 provides:

> A judge or clerk of any court of the United States may tax as costs the following:
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> (3) Fees and disbursements for printing and witnesses;
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> (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
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> ....

28 U.S.C. 1920 (1988). Moreover, "[i]tems proposed by winning parties as costs should always be given careful scrutiny." *Farmer v. Arabian American Oil Co.*, 379 U.S. 227, 235, 85 S. Ct. 411, 416, 13 L. Ed. 2d 248 (1964) .

Comstock first contends that the district court erred when it refused to allow witness fees for each day that two of its experts attended the trial.[34] It is true that a party may recover witness fees not only for days on which the witness testified, but also for days spent attending the trial beforehand. *See Nissho-Iwai*, 729 F.2d at 1552-53 (allowing fees for days prior to witnesses' testimony). Fees for these preliminary days are limited, however, to days that witnesses spend holding themselves available to testify. See *Hurtado v. United States*, 410 U.S. 578, 584, 93 S. Ct. 1157, 1161, 35 L. Ed. 2d 508 (1973)(allowing fees for days spent "in readiness to

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prevailing party unless the court otherwise directs . . . .
Fed. R. Civ. P. 54 (d).

[34] Comstock's experts, David Pike and E.J. Janik, attended 38 and 11 days of trial, respectively. Pike testified on three days, and Janik testified on one day. The district court actually granted five days for Pike and three days for Janik. This equated to the number of days spent testifying plus travel before and after.

testify"); *Nissho-Iwai*, 729 F.2d at 1552 (granting fees for days witness expected to, but did not actually, testify). The district court approved its clerk's determination that only a portion of the days Pike and Janik attended the trial were expended in the expectation that they would testify on those days. We find no abuse of discretion in this decision.

Comstock next insists that the district court should have allowed recovery of the costs of defendants' trial exhibits. A district court may authorize the production of trial exhibits if so doing would "facilitate the just, speedy, and inexpensive disposition of the action." Fed. R. Civ. P. 16(c)(16); *see also Johns-Manville Corp. v. Cement Asbestos Prods. Co.*, 428 F.2d 1381, 1385 (5th Cir. 1970) (looking to Rule 16 for pretrial authorization of models and charts). Absent pretrial approval of the exhibits, however, a party may not later request taxation of the production costs to its opponent. *Johns-Manville*, 428 F.2d at 1385; *see also Studiengesellschaft,* 713 F.2d at 133 (reversing award of exhibit costs where party had not obtained pretrial authorization). Comstock asserts that the pretrial order authorized the production of its exhibits by requiring exhibits to be "exchanged prior to trial in accordance with this order." We find no such authorization in this language: Requiring the exchange of exhibits prior to trial does not imply authorization of production of those exhibits. Accordingly, the district court did not err in denying recovery by Comstock of the costs of its exhibits.

Comstock also challenges the district court's affirmance of the clerk of court's valuation of Comstock's allowable photocopying charges. On this claim Comstock presents virtually no legal argument; instead, it simply alleges conclusionally that both the clerk and the district court abused their discretion. After reviewing the record, we find that the clerk

of court carefully assessed each item in the request. Consequently, we find no abuse of discretion by either the clerk or the district court.

And, like Fischbach, Comstock challenges the district court's simultaneous award of Rule 26(b)(4)(c) costs to LP&L and denial of the same costs to Comstock. It submitted requests for its share of such cost in the sum of $7,254.98; and although LP&L contests the timeliness of Comstock's request and complains in a conclusionary manner that Comstock overstated its claim and failed to offer evidence of its method of calculation, the dollar amount itself is not truly disputed. We have already discussed Rule 26(b)(4) (c) in our review of Fischbach's appeal,[35] and that analysis applies here as well. Comstock is thus entitled to these costs in the amount requested.

LP&L responds that, even if Comstock is allowed recovery of Rule 26(b)(4)(c) costs, its request for these costs was not timely under Local Rule 5.04E.[36] Comstock timely filed its original application for taxation of costs, but did not add its request for Rule 26 costs until nine months later. Although Local Rule 5.04E imposes a thirty day limit on cost applications and supporting memoranda, this rule specifically refers to costs recoverable by "the party in whose favor judgment is rendered." Fed. Local Ct. Rules, E.D. La., Rule 5.04E. We have already noted that Rule 26(b)(4)(c) costs are not limited to prevailing parties; and we hold that Rule 26(b)(4)(c) fees do not fall within the kinds of costs covered by

---

[35] *See supra* Part II (Fischbach Appeal), D.

[36] Local Rule 5.04E provides:

> Within thirty days after receiving notice of entry of judgment, unless otherwise ordered by the court, the party in whose favor judgment is rendered and who claims and is allowed costs, shall . . . file with the Clerk a notice of application to have the costs taxed . . . .

Fed. Local Ct. Rules, E.D. La., Rule 5.04E.

Local Rule 5.04E. *See also Chambers*, 858 F.2d at 360-61 ("The advisory committee notes to Rule 26(b)(4)(c) state that the court may issue an order to pay fees as a condition to discovery 'or it may delay the order until after discovery.'" (quoting Fed. R. Civ. P. 26 (b)(4)(c))). Accordingly, we hold that the district court improperly denied Comstock's Rule 26 (b)(4)(c) request and render judgment in favor of Comstock and against LP&L in the sum of $7,254.98 to cover those items.[37]

C

Comstock's last contention is that the district court erred when it refused to award costs and fees to Comstock for pursuing its cost application. A district court may award costs and fees for time spent litigating a cost or fee request. See *Alberti v. Klevenhagen*, 896 F.2d 927, 937-38 (5th Cir.) (affirming taxation of costs for expenses solely related to fee litigation), *vacated on other grounds*, 903 F.2d 352 (5th Cir. 1990). We shall not, however, disturb a district court's decision regarding fees for cost recovery litigation absent an abuse of discretion. *See id.*; see *also Chemical Mfrs. Ass'n v. U.S.E.P.A.*, 885 F.2d 1276, 1283 (5th Cir. 1989) (approving compensation for time spent on fee application because amount was within district court's discretion); *Spray-Rite Serv. Co. v. Monsanto Co.*, 684 F.2d 1226, 1250 (5th Cir. 1982)(affirming district court's discretion in awarding fees and costs for time spent litigating its right to fees). Comstock recovered only part of the costs and fees it requested. In challenging Comstock's request, LP&L too was only partially successful. Refusing to tax fees and costs for the instant cost litigation fell well

[37] We do not mean to imply that, under all circumstances, a party may file a request for Rule 26(b)(4)(c) costs nine months after judgment on the merits. The record reflects multiple changes and disputes about the fees extending over a period of many months. Accordingly, we merely hold that on the specific facts of this case, Comstock may recover its Rule 26(b)(4)(c) costs.

within the district court's proper exercise of its discretion.

III

For the foregoing reasons, we affirm the district court's determination of LP&L's reasonable hourly rates for its attorneys, but we modify the district court's determination of LP&L's reasonable hours, reducing by 10% the specific portions of those fees challenged by Fischbach as inadequately detailed, and eliminating entirely the portion of the district court's award that allowed $6,465.00 in fees for Attorney Madigan. We also affirm the district court's (1) 15% overstaffing reduction of LP&L's lodestar amount; (2) award of postjudgment interest from the date of the judgment on the merits; (3) award to LP&L of costs (including Rule 26(b)(4)(c) costs, other expenses, and fees for other attorneys). Further, we affirm the district court's award of attorneys' fees to Comstock and its denial of Rule 68 costs to Comstock, and we affirm the quantum of the district court's costs taxation to Comstock; but we reverse the district court's denial of Rule 26 (b)(4)(c) costs to Fischbach and to Comstock, and render judgment therefor against LP&L and in favor of Comstock in the amount of $7,254.98, and in favor of Fischbach in the amount of $10,994.21.

As modified, the award to LP&L against Fischbach is as follows:

Original fee request:	$4,327,276.30
10% reduction - inadequate documentation:[38]	(35,206.50)
Fees disallowed for Attorney Madigan	(6,465.00)

[38] Percentage reduction applicable to (1) $115,070 reflected in quarterly summaries for period from February 1986 to July 1987; (2) $154,080 reflected in month-end summaries for two attorneys during 1987 and 1988; and (3) $82,915 for charges in November and December 1988, for which no time records were submitted, totaling in the aggregate $352,065.00.

Lodestar	$4,285,604.80
15% reduction - overstaffing:[39]	(642,840.72)
Reasonable Attorneys Fees:	$3,642,764.08
Costs	$172,246.61
Other expenses	322,876.90
Fees for other attorneys	9,585.36
GROSS AWARD:	$4,147,472.95
LESS: Rule 26 costs from LP&L to Fischbach	(10,994.21)
Net Award: LP&L against Fischbach	$4,136,478.74

In conclusion we hereby enter judgment in the net sum of $4,136,478.74, plus postjudgment interest, against Fischbach and in favor of LP&L; and we increase the district court's judgment against LP&L and in favor of Comstock by $7,254.98 for its Rule 26 costs.

[39] This reduction was imposed by the district court.

AFFIRMED in part; MODIFIED and, as modified, AFFIRMED in part; and REVERSED and RENDERED in part.

EMILIO M. GARZA, Circuit Judge, concurring in part, and dissenting in part:

I concur in the above opinion with the exception of Part II.B. In my view, the district court applied the wrong legal standard and abused its discretion in refusing to adjust the lodestar for LP&L's limited success. The district court stated that "recovery of the[] reasonable attorney's fees must be sustained regardless of the amount of damages awarded, and explained that cases such as *Farrar v. Hobby*,___U.S.___, ___, 113 S. Ct. 566, 574, 121 L. Ed. 2d 494 (1992)(calling the degree of success the most crucial element in determining the amount of a reasonable fee) , and Hensley v. Eckerhart, 461 U.S. 424, 440, 103 S. Ct. 1933, 1943, 76 L. Ed. 2d 40 (1983) ("A reduced fee award is appropriate if the relief, however significant, is limited in comparison to the scope of the litigation as a whole."), did not apply to mandatory fee statutes.[1] Accordingly, the district court did not even consider the magnitude of LP&L's success.[2] The Supreme Court explicitly has dictated otherwise: *Farrar* and *Hensley* apply to all cases.[3] Because the district court failed to apply the correct legal standard, I would reverse. Moreover, in my view, a recovery of less than

[1] See supra, per curiam opinion, text accompanying note 21.

[2] The majority finds this statement "puzzling" and suggests that the district court did consider the magnitude of LP&L's success. The district court, however, only "considered" LP&L's limited success as a threshold question, that is, whether a mandatory fee statute permits any consideration of limited success. Because the district court answered this question "no," it never reached the question of whether to "act on [the limited success]." It is the failure to reach this secondary question which I challenge and to which I refer here.

[3] See supra per curiam opinion, text accompanying notes 22-23, explaining that the district court's ruling confuses the right to recover fees with the determination of the amount of that fee, and that a finding of significant result alone does not satisfy the district court's duty to evaluate the magnitude of that result. As in *Hensley*, the district court's finding that LP&L's success was significant "does not answer the question of what is ,reasonable, in light of that level of success." 461 U.S. at 439, 103 S. Ct. at 1942.

five percent of the damages requested and against only two of twelve defendants warrants some reduction of fees. For these reasons, I would hold that the district court abused its discretion in refusing to reduce the lodestar, and either remand to the district court to apply the proper standard and to determine what percentage reduction, if any, is warranted by the record's demonstration of LP&L's limited success, or, alternatively, reduce the lodestar by an additional twenty percent. Because the per curiam opinion affirms the district court's ruling on this point, I respectfully dissent.

APPENDIX B

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

LOUISIANA POWER & LIGHT COMPANY	*	CIVIL ACTION
	*	
VERSUS	*	NO. 86-0594
	*	
FISCHBACH AND MOORE, INC., FISCHBACH CORPORATION, THE HOWARD P. FOLEY COMPANY, INC., L. K. COMSTOCK & COMPANY, INC., LKC, INC., COMMONWEALTH ELECTRIC COMPANY, INC., COMMONWEALTH COMPANIES, INC., LORD ELECTRIC COMPANY, INC., and E. C. ERNST, INCORPORATED	*	SECTION "E"
	*	MAGISTRATE 3
	*	
	*	
	*	FILED JUL 22
	*	10 59 AM '92

OFFER OF JUDGMENT

TO: MONROE & LEMANN
201 St. Charles Avenue
Suite 3300
New Orleans, Louisiana 70170-3300
Attorneys for Louisiana Power & Light Company

Pursuant to Rule 68 of the Federal Rule of Civil Procedure, defendants, **L.K. COMSTOCK & COMPANY, INC. and LKC, INC.** hereby offer to allow judgment to be taken against them in this action, in the amount of One Hundred and Fifty Thousand Dollars ($150,000.00) which sum includes: 1) interest, 2) all plaintiffs' costs accrued to date and 3) all reasonable attorney's fees to which the plaintiffs would be entitled. This offer of judgment is made for the purposes specified in Federal Rules of Civil Procedure Rule 58, and is not to be construed either as an admis-

sion that the defendants are in any respect liable in this action, or that the plaintiff has suffered any damage.

Respectfully submitted:

Joel B. Cutler
MURTAGH, COHEN & BYRNE
1100 Franklin Avenue, Suite 303
Garden City, New York 11530
Telephone: (516) 747-1000
CO-COUNSEL FOR L.K. COMSTOCK & COMPANY, INC. AND LKC, INC.

Signed By Robert A. Kutcher
Robert A. Kutcher, Bar No. 7895
Ashley L. Belleau, Bar No. 14077
BRONFIN & HELLER
650 Poydras Street, Suite 2500
New Orleans, Louisiana 70130-6101
Telephone: (504) 568-1888
CO-COUNSEL FOR L.K. COMSTOCK & COMPANY, INC. AND LKC, INC.

CERTIFICATE

I hereby certify that a copy of the above and foregoing has been forwarded to all counsel of record by mailing same, postage prepaid, this 22 day of July, 1992.

Signed By Robert A. Kutcher

APPENDIX C

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

LOUISIANA POWER & LIGHT CO.
versus

CIVIL ACTION
NO. 86-0594
SECTION: E/6

FISCHBACH AND MOORE, INC.,
FISCHBACH CORP.,
L. K. COMSTOCK, INC.,
LKC, INC.
COMMONWEALTH ELECTRIC CO.
COMMONWEALTH COMPANIES, INC.
THE HOWARD P. FOLEY CO.
JOHN D. KEYS
LEWIS E. EASTHAM
J. R. STURGILL, JR.
PAUL M. MURPHY
FRANCIS S. KELLSTROM

INTERROGATORIES TO THE JURY

1. DO YOU FIND BY A PREPONDERANCE OF THE EVIDENCE THAT A DEFENDANT VIOLATED THE FEDERAL ANTI-TRUST LAWS (SHERMA ACT) BY CONSPIRING TO RIG THE AWARD OF THE ELECTRICAL CONTRACT OF THE WATERFORD 3 PROJECT, CAUSING PLAINTIFF DAMAGE?

   YES X NO

   IF YOUR ANSWER TO QUESTION NO. 1 IS **YES** PLEASE ANSWER QUESTION NO. 2. IF YOUR ANSWER TO QUESTION NO. 1 IS **NO** PLEASE SKIP QUESTION NO. 2 AND

PROCEED TO QUESTION NO. 3.

2. WHICH OF THE DEFENDANTS DO YOU FIND IN VIOLATION OF THE FEDERAL ANTITRUST LAWS?

A) FISCHBACH AND MOORE, INC.	YES X	NO
B) L.K. COMSTOCK, INC.	YES	NO X
C) COMMONWEALTH ELECTRIC CO.	YES X	NO
D) COMMONWEALTH COMPANIES, INC.	YES	NO X
E) THE HOWARD P. FOLEY CO.	YES X	NO
F) JOHN D. KEYS	YES	NO X
G) LEWIS E. EASTHAM	YES	NO X
H) J.R. STURGILL, JR.	YES	NO X
I) PAUL M. MURPHY	YES	NO X
J) FRANCIS S. KELLSTROM	YES X	NO

PLEASE PROCEED TO QUESTION NO. 3.

3. DO YOU FIND BY A PREPONDERANCE OF THE EVIDENCE THAT ANY DEFENDANT VIOLATED THE LOUISIANA STATE ANTITRUST LAWS BY CONSPIRING TO RIG THE AWARD OF THE ELECTRICAL CONTRACT OF THE WATERFORD 3 PROJECT, CAUSING PLAINTIFF DAMAGE?

YES X NO

IF YOUR ANSWER TO QUESTION NO. 3 IS **YES** PLEASE PROCEED TO QUESTION NO. 4. IF YOUR ANSWER TO QUESTION NO. 3 IS **NO** PLEASE SKIP QUESTION NO. 4 AND PROCEED TO QUESTION NO. 5.

4. WHICH OF THE DEFENDANTS DO YOU FIND IN VIOLATION OF THE LOUISIANA STATE ANTITRUST LAWS?

A) FISCHBACH AND MOORE, INC.	YES X	NO
B) L.K. COMSTOCK, INC.	YES	NO X
C) COMMONWEALTH ELECTRIC CO.	YES X	NO
D) COMMONWEALTH COMPANIES, INC.	YES	NO X
E) THE HOWARD P. FOLEY CO.	YES X	NO
F) JOHN D. KEYS	YES	NO X
G) LEWIS E. EASTHAM	YES	NO X
H) J.R. STURGILL, JR.	YES	NO X
I) PAUL M. MURPHY	YES	NO X
J) FRANCIS S. KELLSTROM	YES X	NO

PLEASE PROCEED TO QUESTION NO. 5.

5. DO YOU FIND BY A PREPONDERANCE OF THE EVIDENCE THAT ANY DEFENDANT VIOLATED SEC. 1962(c) OF THE FEDERAL RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT (RICO) BY KNOWINGLY AND WILL FULLY CONDUCTING OR PARTICIPATING, DIRECTLY OR INDIRECTLY IN THE CONDUCT OF THE AFFAIRS OF AN ENTERPRISE ENGAGED IN, OR THE ACTIVITIES OF WHICH AFFECTED INTERSTATE OR FOREIGN COMMERCE, THROUGH A PATTERN OF RACKETEERING ACTIVITY, WHILE EMPLOYED BY OR ASSOCIATED WITH SUCH ENTERPRISE, CAUSING PLAINTIFF DAMAGE?

YES X NO

IF YOU ANSWERED **YES** TO QUESTION NO. 5 PLEASE PROCEED TO QUESTION NO. 6. IF YOU ANSWERED **NO** TO QUESTION NO. 5 PLEASE SKIP QUESTION NO. 6 AND PROCEED TO QUESTION NO. 7.

6. WHICH OF THE DEFENDANTS DO YOU FIND IN VIOLATION OF SEC. 1962(c)?

A) FISCHBACH AND MOORE, INC.	YES X	NO
S) L.K. COMSTOCK, INC.	YES	NO X
C) COMMONWEALTH ELECTRIC CO.	YES X	NO
D) COMMONWEALTH COMPANIES, INC.	YES	NO X
E) THE HOWARD P. FOLEY CO.	YES X	NO
F) JOHN D. KEYS	YES	NO X
G) LEWIS E. EASTHAM	YES	NO X
H) J.R. STURGILL, JR.	YES	NO X
I)PAUL M. MURPHY	YES	NO X
J) FRANCIS S. KELLSTROM	YES X	NO

PLEASE PROCEED TO QUESTION NO. 7

7. DO YOU FIND FROM A PREPONDERANCE OF THE EVIDENCE THAT ANY DEFENDANT VIOLATED SEC. 1962(d) OF THE RICO ACT BY ENTERING INTO A CONSPIRACY WITH ANY OTHER PERSON OR CORPORATION TO CONDUCT OR PARTICIPATE, DIRECTLY OR INDIRECTLY, IN THE CONDUCT OF THE AFFAIRS OF AN ENTERPRISE

WHICH WAS ENGAGED IN, OR THE ACTIVITIES OF WHICH AFFECTED INTERSTATE COMMERCE OR FOREIGN COMMERCE THROUGH A PATTERN OF RACKETEERING ACTIVITY, WHILE EMPLOYED BY OR ASSOCIATED WITH SUCH ENTERPRISE, CAUSING PLAINTIFF DAMAGE?

YES X NO

IF YOUR ANSWER TO QUESTION NO. 7 IS **YES** PLEASE PROCEED TO QUESTION NO. 8. IF YOUR ANSWER TO QUESTION NO. 7 IS **NO** PLEASE SKIP QUESTION NO. 8 AND PROCEED TO QUESTION NO. 9.

8. WHICH OF THE DEFENDANTS DO YOU FIND IN VIOLATION OF SEC. 1962(d)?

A) FISCHBACH AND MOORE, INC.	YES X	NO
B) L.K. COMSTOCK, INC.	YES	NO X
C) COMMONWEALTH ELECTRIC CO.	YES X	NO
D) COMMONWEALTH COMPANIES, INC.	YES	NO X
E) THE HOWARD P. FOLEY CO.	YES X	NO
F) JOHN D. KEYS	YES	NO X
G) LEWIS E. EASTHAM	YES	NO X
H) J.R. STURGILL, JR.	YES	NO X
I) PAUL M. MURPHY	YES	NO X
J) FRANCIS S. KELLSTROM	YES	NO X

IF YOUR ANSWERS TO QUESTIONS 1, 3, 5 **AND** 7 ARE **NO** PLEASE DATE AND SIGN THIS FORM AND HAND IT TO THE MARSHAL

AND ADVISE HIM THAT YOU HAVE REACHED A VERDICT. IF YOU ANSWERED **YES** TO QUESTIONS 1, 3, 5 **OR** 7 PLEASE PROCEED TO QUESTION NO. 9.

9. DO YOU FIND BY A PREPONDERANCE OF THE EVIDENCE THAT DEFENDANTS FRAUDULENTLY CONCEALED THEIR BID RIGGING OF THE ELECTRICAL CONTRACT OF THE WATERFORD 3 PROJECT SO THAT PRIOR TO FEBRUARY 7, **1982** LP&L DID NOT KNOW OR WAS UNABLE TO DISCOVER BY THE EXERCISE OF DUE DILIGENCE THAT THE CONTRACT WAS RIGGED AND THAT IT MAY HAVE SUFFERED DAMAGE AS A RESULT?

YES X NO

IF YOUR ANSWER TO QUESTION NO. 9 IS **NO** PLEASE DATE AND SIGN THIS FORM AND HAND IT TO THE MARSHAL AND ADVISE HIM THAT YOU HAVE REACHED A VERDICT. IF YOUR ANSWER TO QUESTION NO. 9 IS **YES** PLEASE PROCEED TO QUESTION NO. 10.

10. DO YOU FIND BY A PREPONDERANCE OF THE EVIDENCE THAT DEFENDANTS FRAUDULENTLY CONCEALED THEIR BID RIGGING OF THE ELECTRICAL CONTRACT OF THE WATERFORD 3 PROJECT SO THAT PRIOR TO FEBRUARY 7, **1985** LP&L DID NOT KNOW OR WAS UNABLE TO DISCOVER BY THE EXERCISE OF DUE DILIGENCE THAT THE CONTRACT WAS RIGGED AND THAT IT MAY HAVE SUFFERED DAMAGE AS A RESULT?

YES NO X

PLEASE PROCEED TO QUESTION NO. 11.

11. DO YOU FIND BY A PREPONDERANCE OF THE EVIDENCE THAT FISCHBACH CORPORATION WAS ESTABLISHED FOR FRAUDULENT PURPOSES SUCH THAT IT MAY BE HELD LIABLE FOR ANY BID RIGGING COMMITTED BY FISCHBACH AND MOORE, INC.?

YES X NO

PLEASE PROCEED TO QUESTION NO. 12.

12. DO YOU FIND BY A PREPONDERANCE OF THE EVIDENCE THAT LKC, INC. WAS ESTABLISHED FOR FRAUDULENT PURPOSES SUCH THAT IT MAY BE HELD LIABLE FOR ANY BID RIGGING COMMITTED BY L. K. COMSTOCK, INC.?

YES NO X

PLEASE PROCEED TO QUESTION NO. 13.

13. WHAT AMOUNT OF DAMAGES, IF ANY, DO YOU FIND BY A PREPONDERANCE OF THE EVIDENCE THAT LP&L SUSTAINED AS A RESULT OF THE VIOLATIONS OF FEDERAL AND OR STATE LAWS?

$500,000.00

NEW ORLEANS, LOUISIANA, THIS 24 DAY OF September 1992.

Signed By Amelia B. Johnson

FOREPERSON

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

LOUISIANA POWER & LIGHT CO.

versus

CIVIL ACTION

FISCHBACH AND MOORE, INC.,
FISCHBACH CORP.,
L. K. COMSTOCK, INC.,
LKC, INC.
COMMONWEALTH ELECTRIC CO.
COMMONWEALTH COMPANIES, INC.
THE HOWARD P. FOLEY CO.
JOHN D. KEYS
LEWIS E. EASTHAM
J. R. STURGILL, JR.
PAUL M. MURPHY
FRANCIS S. KELLSTROM

NO. 86-0594

SECTION: E/6

FILED SEP 25
10 33 AM '92

JUDGMENT

Considering the record, the answers by the jury to the interrogatories propounded to it by the Court, the direction of the Court as to entry of Judgment, and the law, for the reasons assigned,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of plaintiff Louisiana Power & Light Co., and against defendants Fischbach and Moore, Inc., Fischbach Corporation, Commonwealth Electric Co., The Howard P. Foley Co., and Francis S. Kellstrom, in the true sum of **ONE MILLION FIVE HUNDRED THOUSAND($ 1,500,000.00) DOLLARS**, with interest from the date of judgment, the cost of suit, including a reasonable attorney's fee;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendants L. K. Comstock, Inc., LKC, Inc., Commonwealth Companies, Inc., John D. Keys, Lewis Z. Eastham, J.R. Sturgill, Jr., and Paul M. Murphy, and against plaintiff, Louisiana Power & Light Co., **DISMISSING** plaintiff's complaint at its cost.

New Orleans, Louisiana, this 25 day of September, 1992.

Signed By Marcel Livaudais, Jr.
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

LOUISIANA POWER & LIGHT COMPANY	CIVIL ACTION
versus	NO. 86-0594
FISCHBACH AND MOORE, INC., et al	SECTION: E/3
	FILED NOV 5 9 23 AM '92

RULINGS ON MOTIONS

These motions have been submitted to the Court for determination:

1. Motion of Fischbach and Moore, Inc., for judgment as a matter of law;

2. Motion of Fischbach Corporation and Francis S. Kellstrom for judgment as a matter of law, adopting motion of Fischbach and Moore, Inc.;

3. Motion of Louisiana Power & Light Company for judgment as a matter of law, or alternatively, for new trial regarding prescription of state law claims;

4. Renewed Motion of Fischbach Corporation after trial for judgment as a matter of law, and/or for new trial regard ing corporate piercing issues;

5. Motion of L.K. Comstock, Inc., and LKC, Inc., to amend judgment.

Motions 1 through 4 address themselves to the factual findings

made by the jury, except for the alternative new trial requests. Considering the motions, memoranda of counsel, the trial testimony and evidence and the law, the Court is of the opinion that the jury had sufficient evidence and was appropriately instructed on the law so as to enable it to reach the findings it made. Further, considering the matter *in toto*, the Court is of the opinion that the requests for a new trial are unwarranted.

Motion 5 seeks an amendment to the judgment awarding costs, including reasonable attorney's fees to L. K. Comstock, Inc., and LKC, Inc. ("the Comstock defendants"), pursuant to Rule 68. Rule 68 states, in pertinent part:

> At any time more than 10 days before the trial begins, a party defending against a claim may, serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or the effect specified in the offer, with costs then accrued. . . . If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer.

Rule 68, Federal Rules of Civil Procedure.

The Comstock defendants argue that since judgment was entered in their favor and against the plaintiff, it should be awarded costs, including attorneys' fees, under this rule. The judgment which was entered in favor of the Comstock defendants and against plaintiff Louisiana Power and Light Company awarded defendants costs as a prevailing party in accordance with Rule 54(d).

Upon reviewing the motion, memoranda of the parties, and the law, the Court finds that the motion should be denied on two grounds. The first is that the offer of judgment was not timely made in accordance with the rule and applicable jurisprudence. Rule 68 explicitly requires

that the offer be served *more than 10 days* before the beginning of trial. Excluding weekends, which is required by Polk v. Montgomery County, Maryland, 130 F.R.D. 40, 42 (D. Md.199) and two days of jury selection, which is required by Greenwood v. Stevenson, 88 F.R.D. 225 (D.R.I. 1980), the offer was one day late. The offer was filed and served on July 22, 1992 and opening statement began on August 5, 1992. To have been served *more than 10 days* before the trial began, the offer would have had to be served by July 21, 1992. Thus, the offer was untimely.

The second basis for denial of the motion is the holding of the Supreme Court in Delta Air Lines, Inc. v. August, 450 U.S. 346, 101 S.Ct. 1146 (1981). The Court there found that "it is clear that [Rule 68] applies only to offers made by the defendant and only to judgments obtained by the plaintiff" and that it was inapplicable when it is the defendant who obtains judgment in its favor. 450 U.S. at 352, 101 S.Ct. at 1150. Since here the Comstock defendants obtained judgment in their favor, under the Delta Air Lines decision, the rule does not apply. The defendants' attempts to distinguish this decision amount to a distinction with no difference.

Accordingly, for the above and foregoing reasons,

IT IS ORDERED that motions 1, 2, 3, 4, and 5 be and are hereby **DENIED**.

New Orleans, Louisiana, November 4, 1992.

Signed By Marcel Livaudais, Jr.
United States District Judge

Supreme Court, U.S.
FILED
AUG 03 1994
OFFICE OF THE CLERK

(2)

No. 94-24

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1995

L.K. COMSTOCK & COMPANY, INC., ET AL.,
Petitioners,

V.

LOUISIANA POWER & LIGHT COMPANY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MONROE & LEMANN
Perry R. Staub, Jr.
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1995

QUESTIONS PRESENTED

I. WHETHER the Court of Appeals for the Fifth Circuit was correct in affirming the district court's denial of Petitioners' Motion to Amend Judgment to enforce a Federal Rules of Civil Procedure Rule 68 Offer of Judgment where the plaintiff-offeree, LP&L, did not obtain a judgment against the defendant-offerors, Comstock and LKC.

II. WHETHER attorneys' fees are recoverable as an element of costs under a Rule 68 Offer of Judgment in an antitrust action.

III. WHETHER Petitioners' Rule 68 Offer of Judgment was untimely.

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Citations iii

Statement of the Case 2

Summary of the Argument 4

Argument 5

I. Rule 68 Costs Are Not Recoverable by a Prevailing Defendant 5

II. Rule 68 Does Not Require the Plaintiff to Pay Attorneys' Fees of Prevailing Defendants in an Antitrust Action 9

III. Petitioners' July 2, 1992 Offer of Judgment Proved Untimely 10

Conclusion 13

TABLE OF CITATIONS

Cases: **Page**

Allen v. United States Steel Corp.,
665 F.2d 689 (5th Cir. 1982) 5

Delta Air Lines, Inc. v. August,
450 U.S. 346 (1981) ..... *passim*

Equal Employment Opportunity Comm'n v. Bailey Ford, Inc.,
26 F.3d 570 (5th Cir. 1994) 5

Ezelle v. Bauer Corp.,
154 F.R.D. 149 (S.D. Miss. 1994) 6

Fincher v. Keller Indus., Inc.,
905 F.2d 691 (3d Cir. 1990) 4, 5

Johnston v. Penrod Drilling Co.,
803 F.2d 867 (5th Cir. 1986) 7

Kason v. Amphenol Corp.,
132 F.R.D. 197 (N.D. Ill. 1990) 11

Lentomyynti Oy v. Medivac, Inc.,
997 F.2d 364 (7th Cir. 1993) 4, 5, 8

London v. Hunt,
938 F.2d 450 (3d Cir. 1991) 9

TABLE OF CITATIONS

Cases

Page

Marek v. Chesney, 473 U.S. 1 (1985) 10

Polk v. Montgomery County,
130 F.R.D. 40 (D. Md. 1990) 6

Roberts v. Homelite Div. of Textron, Inc.,
117 F.R.D. 637 (N.D. Ind. 1987) 6

Sack v. Carnegie Mellon Univ.,
106 F.R.D. 561 (W.D. Pa. 1985) 5

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157 F.R.D. 45, 47 n. 3 (N.D. Ill. 1994) 6

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118 F.R.D. 425 (W.D. Pa. 1988) 6

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131 F.R.D. 98 (E.D. Pa. 1990) 6

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15 U.S.C. § 15 ..... 9, 10

42 U.S.C. § 1988 9

Fed. R. Civ. P. 54(d) 3, 6, 8

Fed. R. Civ. P. 6(a) 10-12

Fed. R. Civ. P. 6(e) 11

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J. Moore, 7 *Moore's Federal Practice*, ¶ 68.03 at 68-7 11

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J. Moore, 7 *Moore's Federal Practice* ¶ 68.04 at p. 68-11. 11

Note, *Rule 68: A "New" Tool for Litigation*, 1978 Duke L.J. 889 8

No. 95-24

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1995

LOUISIANA POWER & LIGHT COMPANY
Respondent

VERSUS

L.K. COMSTOCK & COMPANY, INC., ET AL,
Petitioners

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

Respondent, Louisiana Power & Light Company ("LP&L"), respectfully requests, for reasons explained fully below, that this Court deny the Petition for Writ of Certiorari submitted by Petitioners, L.K. Comstock & Company, Inc. ("Comstock"), and LKC, Inc.("LKC").

Statement of the Case

On February 7, 1986, LP&L, respondent herein, commenced this action under the Sherman Act and RICO against various defendants, including petitioners, Comstock and LKC, alleging that the defendant electrical contractors who bid on the Waterford 3 Nuclear Power Plant electrical contract colluded and rigged bids.

On July 22, 1992, defendants, Comstock and LKC, mailed to LP&L an Offer of Judgment that stated that pursuant to Fed. R. Civ. P. 68, Petitioners thereby would allow judgment to be taken against them in the amount of $150,000, including interest, costs, and attorneys' fees accrued to date.[1] Appendix B, Petitioners' Brief. LP&L chose not to accept the offer.[2]

On September 25, 1992, following nearly eight weeks of trial, the district court entered Judgment in accordance with the jury's answers to the interrogatories propounded by the court. Appendix C and D, Petitioners' Brief. Although LP&L prevailed on its federal antitrust and RICO claims

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[1] Comstock further qualified its offer by stating that it was "not to be construed either as an admission that the defendants are liable in any respect in this action...."

[2] Apart from its untimely submission, *see discussion infra*, Comstock's offer failed to make separate provision for over six years' attorneys' fees incurred by LP&L in bringing the bid-riggers to justice. With attorneys' fees running into millions of dollars, Comstock reasonably knew that the only possible judgment that could be more favorable than its Rule 68 offer was an outright victory.

against two groups of defendants, judgment was entered in favor of Petitioners herein, Comstock and LKC, dismissing LP&L's suit against Petitioners at LP&L's cost. *Id.*

On November 4, 1992, the district court denied Petitioners' Motion to Amend the Judgment, which requested an award of attorneys' fees pursuant to Fed. R. Civ. P. 68. Appendix E-2-3, Petitioners' Brief. The court stated that "[t]he judgment which was entered in favor of the Comstock defendants and against plaintiff Louisiana Power and Light Company awarded defendant costs as a prevailing party in accordance with Rule 54(d)." *Id.* The court further found that

> "it is clear that [Rule 68] applies only to offers made by the defendant and only to judgments obtained by the plaintiff" and that it was inapplicable when it is the defendant who obtains judgment in its favor. 450 U.S. at 352, 101 S.Ct. at 1150. Since here the Comstock defendants obtained judgment in their favor, under the *Delta Air Lines* decision, the rule does not apply. The defendants' attempts to distinguish this decision amount to a distinction with no difference.

Appendix E-3, Petitioners' Brief. The United States Court of Appeals for the Fifth Circuit ("Fifth Circuit") affirmed this holding. Appendix A, Petitioner's Brief.

Summary of the Argument

Neither lower court erred in denying Petitioners' request for costs and attorneys' fees pursuant to Fed. R. Civ. P. 68.[3] Petitioners' assertion that its Petition presents an issue of first impression represents a strained effort to avoid the unequivocal holding of *Delta Air Lines v. August*, 450 U.S. 346 (1981), that Rule 68 applies only where the offeree (LP&L) has obtained a judgment against the offeror (Comstock and LKC). Comstock and LKC's offer fails because LP&L failed to obtain a judgment against Comstock. In any event, Petitioners' offer of judgment was untimely.

Comstock and LKC fail to satisfy criteria traditionally applied by this Court in determining whether to grant a Writ of Certiorari. This case involves no conflict among the Federal Circuit Courts of Appeal; the decision is in accord with Supreme Court precedent; and this case presents no conflict of any law.

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[3] At the outset, it is doubtful that the Comstock Petitioners' arguments are even properly before this Court. Comstock postures its argument procedurally as seeking review of the Fifth Circuit's affirmance of the district court's denial of Petitioner's Motion to Amend the Judgment so as to recognize its Rule 68 Offer of Judgment. A motion to recover Rule 68 costs is not properly raised via a motion to amend under Rule 59(e), as Comstock has sought to do here. *Lentomyynti Oy v. Medivac, Inc.*, 997 F.2d 364 (7th Cir. 1993); *Fincher v. Keller Industries, Inc.*, 905 F.2d 691 (3d Cir. 1990).

Argument

I. Rule 68 Costs Are Not Recoverable by a Prevailing Defendant

At issue is the fourth sentence of Rule 68, which provides that the plaintiff-offeree must pay the post-offer costs incurred by the defendant "[i]f the judgment finally obtained by the offeree is not more favorable than the offer."

In *Delta Air Lines, Inc. v. August*, 450 U.S. 346 (1981), this Court held that this plain language, as well as the purpose and history of Rule 68, dictates that Rule 68 does not apply when a judgment is entered in favor of the defendant. This Court reasoned that the language "judgment . . . obtained by the offeree" means a judgment favorable to the offeree, and that Rule 68 is triggered only by such a judgment. *Delta*, 450 U.S. at 351-52. Because the defendant-offeror in *Delta* obtained a judgment entirely in its favor, the Court held that the defendant was not entitled to its post-offer costs under Rule 68. *Id. Accord, Equal Employment Opportunity Comm'n v. Bailey Ford, Inc.*, 26 F.3d 570, 571 (5th Cir. 1994) (defendant could not invoke Rule 68 where judgment was in favor of defendant because defendant did not "obtain" a judgment); *Lentomyynti Oy v. Medivac, Inc.*, 997 F.2d 364 (7th Cir. 1993) (same); *London v. Hunt*, 938 F.2d 450, 451-52 n. 1.(3d Cir. 1991); *Fincher v. Keller Indus., Inc.*, 905 F.2d 691, 692 (3d Cir. 1990); *Allen v. United States Steel Corp.*, 665 F.2d 689, 697 (5th Cir. 1982); *Trent v. Parkview Metals Products*, 157 F.R.D. 45, 47 n. 3

(N.D. Ill. 1994); *Ezelle v. Bauer Corp.*, 154 F.R.D. 149, 152-53 (S.D. Miss. 1994); *Woern v. K Mart Corp.*, 131 F.R.D. 98, 99 (E.D. Pa. 1990); *Trohoske v. McDonough Power Equipment Co.*, 118 F.R.D. 425, 426 (W.D. Pa. 1988); *Roberts v. Homelite Div. of Textron, Inc.*, 117 F.R.D. 637, 639 (N.D. Ind. 1987); *Sack v. Carnegie Mellon Univ.*, 106 F.R.D. 561, 563 (W.D. Pa. 1985).

It matters not, as Petitioners argue, whether a case involves one defendant, like *Delta*, or whether a case involves one plaintiff and multiple defendants where the plaintiff obtained a favorable judgment against some co-defendants but not the offering defendants, like the case at hand. Rule 68 only applies to those situations where the offering defendant loses, but suffers judgment in an amount less than that offered. *Delta*, 450 U.S. at 351-52.

The purpose of Rule 68 is to encourage litigants to settle. *Delta*, 450 U.S. at 352. By providing that a defendant will be awarded costs if the plaintiff is awarded less than that offered by the defendant, Rule 68 provides the defendant with a strong incentive to offer a fair settlement. "[I]t does the defending party no good to make an offer of judgment that is not what the claimant might reasonably be expected to recover; he will not free himself of the costs if the judgment recovered is more than the offer." 12 C. Wright & A. Miller, Federal Practice and Procedure § 3001, p. 56 (1973).

Similarly, a plaintiff has little incentive to settle where a finding of liability is probable, inasmuch as a prevailing plaintiff will likely obtain all of its costs pursuant to Rule

54(d).[4] Rule 68 provides an incentive to settle by withholding from the plaintiff "some of the benefits of victory if its recovery is less than the offer." *Delta*, 450 U.S. at 352. *See also Johnston v. Penrod Drilling Co.*, 803 F.2d 867, 869 (5th Cir. 1986).

The crux of the *Delta* holding was that, in order for Rule 68 to apply, the offeree must have obtained a judgment against the offeror. *Delta*, 450 U.S. at 352. If that initial requirement is met, the court then weighs the offerors' offer against the judgment obtained by the offeree to determine if that judgment is "not more favorable than the offer." *Id.* Petitioners urge this Court to make a nonsensical comparison: their position is that the court must weigh the offerors' offer against the judgment obtained against the defendants other than offerors. Obviously, this would amount to a comparison of apples to oranges.

Rule 68 "is a mandatory rule to be narrowly applied." *Johnston v. Penrod Drilling Co.*, 803 F.2d 867, 869 (5th Cir. 1986). The Rule has a limited applicability in that Rule 68 was designed to encourage settlement "in those cases in which there is a strong probability that the plaintiff will obtain a judgment but the amount of recovery is uncertain." *Delta*, 450 U.S. at 352.

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[4] Where a statute underlying a plaintiff's cause of action provides for the award of costs, including attorneys' fees, if plaintiff prevails, this argument applies with even more force, *i.e.*, where a finding of liability is probable and the plaintiff has little incentive to settle absent Rule 68, inasmuch as the plaintiff knows that he will be awarded costs and attorneys' fees.

"Rule 68 would provide little, if any, additional incentive if it were applied when the plaintiff loses." *Delta*, 450 U.S. at 352. Indeed, the application of Rule 68 is unnecessary in cases where the defendant wins, inasmuch as the trial judge has discretion to grant costs to the prevailing defendant under Rule 54(d).[5] *See Lentomyynti Oy v. Medivac, Inc.*, 997 F.2d 364 (7th Cir. 1993). If the trial judge decides that the prevailing defendant is not entitled to costs pursuant to Rule 54(d), that defendant ought not be able to override the court's decision by invoking Rule 68 to compel an award of costs. *See Delta*, 450 U.S. at 355 n.15 (citing Note, *Rule 68: A "New" Tool for Litigation*, 1978 Duke L.J. 889, 895).

Rule 68 was never intended to be a sanction for either winning or losing, as is Rule 54(d). Rather, Rule 68 was enacted to encourage early settlements in cases where liability is apparent, but the quantum of damages is questionable. *Delta*, 450 U.S. at 352.

As Petitioners fairly admit, the district court entered

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[5] The district court did, in fact, award costs to Petitioners pursuant to Rule 54(d). Appendix D-2, E-2, Petitioners' Brief. The only costs at issue here are attorneys' fees. This fact highlights the inconsistency of Petitioners' argument. Rule 68, unlike Rule 54(d), operates to award costs to the loser. Rule 54(d) grants the court discretion to award costs to the winner. If Petitioners' arguments were correct, Rule 68 and 54 would overlap in that both would apply where the defendant won, but the judge would be without discretion to deny costs to a prevailing defendant in certain situations. This cannot have been the legislature's intent in enacting Rule 68.

Judgment in favor of Petitioners, dismissing LP&L's complaint against petitioner at LP&L's cost. Petition at 4. Because LP&L did not obtain a favorable judgment against Petitioners, Petitioners may not invoke Rule 68, and both the United States District Court for the Eastern District of Louisiana and the United States Court of Appeals for the Fifth Circuit were entirely correct in so holding. As the trial court recognized, Petitioners' efforts "to distinguish [*Delta*] amount to a distinction with no difference." Appendix E at E-3, Petitioners' Brief.

II. Rule 68 Does Not Require the Plaintiff to Pay the Attorneys' Fees of Prevailing Defendants in an Antitrust Action

In *Marek v. Chesney*, 473 U.S. 1 (1985), this Court allowed a losing defendant to recover attorneys' fees as an element of costs pursuant to the cost-shifting provision of Rule 68. This Court based its decision on the fact that the underlying statute, 42 U.S.C. § 1988, granted attorneys' fees to a prevailing plaintiff, holding that "all costs properly awardable in an action are to be considered within the scope of Rule 68 'costs.'" *Marek*, 473 U.S. at 9.

Petitioners' request that this Court extend its *Marek* reasoning highlights the fallacy of the argument that Rule 68 should apply even in a situation in which the defendant prevails. Section 15 of the Clayton Antitrust Act, 15 U.S.C. § 15, provides that if a plaintiff in an antitrust suit prevails, that plaintiff shall recover costs, including reasonable

attorneys' fees.

In the present case, however, LP&L did not prevail against defendant-Petitioners. In accordance with 15 U.S.C. § 15, attorneys' fees are not "costs properly awardable" in ***this*** suit and are, thus, not subject to the cost-shifting provision of Rule 68.

III. Petitioners' July 22, 1992 Offer of Judgment Proved Untimely

Although Petitioners' recitation of the facts surrounding its Rule 68 offer of judgment is essentially accurate, their effort to justify the tardiness of the offer contradicts established rules of statutory construction. Rule 68 requires that an offer of judgment be served on the plaintiff "more than 10 days before the trial begins." "[T]he 10 day limitation prescribed under Rule 68 is covered by the exclusion of intervening weekends and holidays" as provided in Rule 6(a). *Polk v. Montgomery County*, 130 F.R.D. 40, 42 (D. Md. 1990); J. Moore, *Moore's Federal Practice* ¶ 68.04 at p. 68-8 ("The ten-day period is determined in accordance with Rule 6(a), which excludes Saturdays, Sundays, and legal holidays from the computation of a prescribed period of time that is less than 11 days."). No court has ever held otherwise.

The record shows that Petitioners filed their Rule 68 offer on July 22, 1992, and the certificate of service attached thereto states that the offer was served by mail that same

date.[6] Appendix B, Petitioners' Brief.

Under Rule 6(a), the "day of the act . . . from which the designated period of time begins to run shall not be included" in the computation of time. Even if the defendants had served LP&L by mail on July 22, 1992, the ten-day notice mandated by Rule 68 had not run "before the trial began."[7] "An offer that is served less than ten days before the trial begins is untimely and will not support an award of costs under Rule 68." J. Moore, 7 *Moore's Federal Practice* ¶ 68.03 at p. 68-7.[8]

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[6] Petitioners erred by filing their unaccepted Rule 68 offer. *Kason v. Amphenol Corp.*, 132 F.R.D. 197 (N.D. Ill. 1990). *See* J. Moore, 7 *Moore's Federal Practice* ¶ 68.04 at p. 68-11.

[7] Under Fed. R. Civ. P. 6(e), "[w]henever a party has the right or is required to do some act . . . within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party by mail, 3 days shall be added to the prescribed period." When a party serves a pleading by mail, the opposing party obviously does not receive the paper that same day. By adding three days to the date of service by mail, Rule 6(e) operates to ensure that a party is given the full benefit of the time periods prescribed by various procedural rules. Because Petitioners' offer of judgment was untimely even under the most liberal computation, LP&L need not address how Petitioners' service by mail affected the ten-day time period of Rule 68.

[8] Petitioners argue that the trial "began" on August 5, 1992, at the commencement of opening arguments rather than on August 3, 1992, on which date jury selection began. Calculating the ten-day period from the date of opening arguments rather than the day on which jury selection begins, would create too much uncertainty for offering defendants, inasmuch as one cannot pre-determine the amount of time it might take for jury selection and thus could not determine the date on which a Rule 68 must be

Indeed, Petitioners ignore the clear language of Rule 68. The second sentence of Rule 68 requires the offeree to act on the offer "***within*** 10 days after the service of the offer." (emphasis added). This provision clearly incorporates the counting mechanism established by Rule 6(a) for delays less than 11 days. Petitioners' position that the language "more than 10 days," used in the first sentence of Rule 68, implicates a different counting rule would thus create the anomaly that the offer need only be outstanding for a period less than that allowed to the offeree for acceptance.

Hence, even if Petitioners could shield their offer from *Delta*, their offer was nevertheless invalid because it was untimely.

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made. Nevertheless, even assuming as true petitioners' argument that the trial began on August 5, petitioners' offer of judgment was untimely, having been served nine days prior to the commencement of the trial.

Conclusion

Accordingly, LP&L requests that this Court deny Comstock and LKC's Petition for Writ of Certiorari. This case present no issue appropriate for the Court's review. Moreover, the lower courts' decisions were not erroneous.

Respectfully submitted,

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